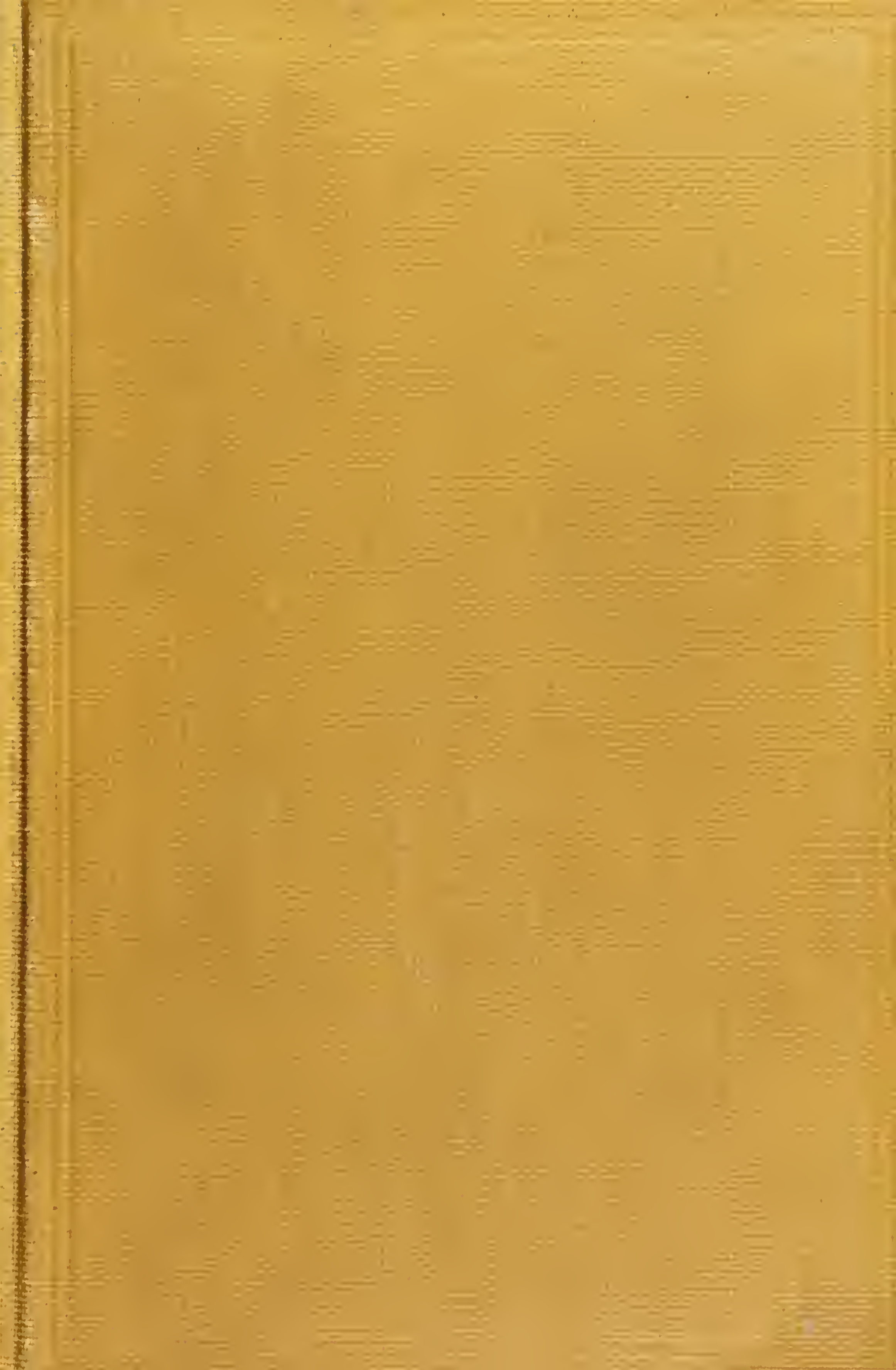

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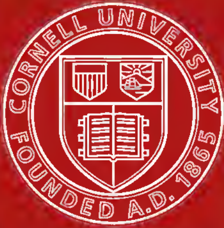

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COMMERCIAL ARBITRATION

BEING A COMPILATION OF

AWARDS OF ARBITRATION COMMITTEES OF VARIOUS TRADE ASSOCIATIONS AND CHAMBERS OF COMMERCE IN THE UNITED STATES

TOGETHER WITH

INTRODUCTORY TEXT ON COMMON-LAW AND STATUTORY ARBITRAMENT

BY
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ARBITRIUM EST JUDICIUM BONI VIRI,
SECUNDUM ÆQUUM ET BONUM

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By H. ARTHUR DUNN

Preface

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THE settlement of disputes between merchants by arbitration originated when peoples began crossing seas and boundaries to barter their goods for the merchandise of others. While it is not the purpose of this work to undertake an historical survey of the development of arbitration in commercial matters, it is worthy of note that there has been rapid advancement in the number and varied character of arbitrations between persons engaged in business, until to-day, in many branches of industry, particularly in the production, sale and distribution of staples and raw products, arbitration is recognized as an essential element of the contractual relation.

Notwithstanding the increased acceptance of arbitration in commercial disputes, there is no authoritative work wherein the business man may obtain the decisions of arbitrators covering important trade customs and the interpretation of familiar contract terms, problems that arise daily in almost every active line of commerce. Hence, the authors have undertaken this work in the hope that it may open the way to the establishment of a system of Reports of Commercial Arbitrations generally recognized and accepted as sound business doctrine by those engaged in commerce.

Various trade and commercial organizations throughout the United States have established methods of arbitration for the adjustment of disputes arising out of contracts. Some of these methods have endured for many years and have been strengthened and improved as time and experience have justified the evolution. Merchants have elected to submit their controversies with each other to these forums, rather than face the vexatious delays, technicalities and expense involved in litigation, fully realizing that prompt decision was certain and that in the main the cause was given careful and frequently expert attention by persons familiar with the subject matter and conversant with the customs and usage of the trade involved. It is not an idle assertion that even the most contentious claimant will admit that arbitrators invariably give to a cause under submission more painstaking thought than is accorded by the average jury summoned on a similar cause in a court of justice. A jury is not selected for their special qualifications in the subject being litigated but rather because they are unbiased and unacquainted with the issue, whereas arbitrators are especially chosen because of their experience and fitness to decide the particular questions involved. As to the fairness of arbitrators in

commercial disputes, aside from all other considerations, self-interest alone requires them to exercise meticulous care in fixing just rules by their impartial decisions; for a policy or custom so fixed in an established trade of necessity affects themselves in that trade in future transactions.

In arbitrations, technicalities and subterfuge are swept aside by conscientious arbitrators, who seek to do abstract justice and exact equity. Technical proof is not so essential as substantial proof. Arbitrators, unhampered by skillful objections, endeavor to discover the facts in a matter under submission, and having done so, it is their duty, imposed by the very highest trust in their integrity, to make their findings and award in accordance therewith. This is not intended by indirection as a criticism of our judicial system, for in courts of justice there must be rigid rules for the guidance of bench and bar, else the whole system would fail to function orderly. The one criticism that the authors voice in common with the best thought of the country is that the wheels of justice grind so exceedingly slow that litigants too frequently lose even in victory.

In the preparation of this work the authors are indebted to those trade organizations which have made available their records on arbitration, and they acknowledge with grateful appreciation the helpful suggestions and cooperation of those leaders of industry who have turned from their own affairs from time to time to give consideration and practical advice concerning the scope and method of treating the subjects chosen for the work.

The authors have striven for simplicity of phrase, stripped of legal terminology, in order that the work may become a ready reference for those whose function it is to guide business enterprises along a course well charted as to fair dealing between competitors. At the same time it is hoped it will be found of some value to the legal profession, since it places before them accurate and intimate information as to the views of merchants on disputed points in many lines of industry, and to a certain extent thereby establishes trade customs. Likewise, it will be helpful to the student of law in that the legal principles of both common law and statutory arbitration are elucidated, and to the student of economics it should be of value since it points the way to avoid the mistakes and missteps in business that make for waste and controversy and therefore retard progress.

San Francisco,
Dec. 1, 1922.

H. ARTHUR DUNN,
HENRY P. DIMOND.

Arbitration Under Common Law

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§1. **Arbitration Defined**—Arbitration is the voluntary submission by the interested parties of a dispute, difference, or matter in controversy to the investigation or inquiry of one or more disinterested persons, appointed by the parties, to be finally determined and decided by such person or persons.[1] Arbitration is a quasi judicial procedure whereby the parties designate their own unofficial judge or judges to adjudicate the matter submitted, and those so designated are called arbitrators.[2] Their decision or determination is called the award.[3]

§2. **Common Law and Statutory**—Arbitration may be classified (1) as under the common law, whereby the parties have the protection of their respective rights afforded by the rules of common law and are subjected to such limitations as are thereby imposed, and (2) under statutory law, whereby the parties participate in the enlarged benefits granted by the statute and must adhere to the restrictions thereof.

Hence it is that the two classifications are herein treated separately, the purpose being to avoid confusion in explaining the differences and distinctions between the two, thereby enabling those for whom this work is written more readily to grasp and understand the niceties of the issues that may be raised.

§3. **Arbitration and the Courts**—Arbitration, anciently frowned upon by the courts as being an encroachment upon their

1. Garr v. Gomez, 9 Wend. (N. Y.) 649, 661, Benjamin v. U. S., 29 CtCl. 417-19.
2. Shively v. Knoblock, 8 Ind. A. 433, 35 NE. 1028-29.
3. Benjamin v. U. S., 29 CtCl. 417-19.

functions, is now favored and encouraged by the courts as affording disputants speedy relief at a minimum of expense.[4] In the progressive development of our judicial system, the courts have been mindful that a rule which affords persons an opportunity to compose their differences makes for advancement, and since it does, they have inclined strongly in its favor. The courts will give every reasonable intendment to an award to uphold its validity, for the parties having selected their forum, may not be permitted to avoid responsibility for the acts of their own creatures.[5]

§4. **Commercial Recognition**—Persons engaged in commerce, since the very earliest times, have inclined toward the amicable adjustment of their differences arising in trade, until to-day, in matters involving commercial transactions, the settlement of disputes by arbitration is universally recognized and accepted and contracts between merchants usually contain a provision that any difference arising thereunder shall be settled by submission to arbitrators, to be selected either by the parties or by reference to a committee of a designated organization.

§5. **What May Be Submitted to Arbitration**—At common law any dispute or difference of a civil nature may be submitted to arbitration.[6] It is not necessary that there be a legal cause of action depending between the parties to submit,[7] but any difference, dispute or doubt as to the rights of the parties may be made the subject of arbitrament. Questions of law may be submitted.[8] The first requisite to a submission is a difference or dispute, the cause of which is valid in itself.[9] A dispute arising out of an illegal contract may be submitted to arbitrators, but their award would be treated as a nullity in law and in equity, for an award cannot make that legal which the law declares void.[10] Matters of a criminal nature cannot be submitted.[1]

§6. **Distinguished from Reference**—Arbitration is distinguished from a reference in this, that under a submission to arbitration the

4. Suksdorf v. Suksdorf, 161 P. 465.
5. Utah Const. Co. v. West. Pac. 162 P. 6310,
Karthaus v. Ferrer, 1 Pet. 228, 7 L. 121, Bk. II U. S. Notes, 688.
6. Byrd v. Odem, 9 Ala. 755-766.
7. Dilks v. Hammond, 86 Ind. 563;
Downing v. Lee, 98 Mo. A, 604, 73 SW. 721;
Parrish v. Strickland, 52 N. C. 504.
8. Young v. Walter, 9 Ves. Jr., 364, 32 Reprint 642;
Lange v. Stouffer, 16 Pa. 251.
9. Pittsburgh Const. Co. v. West Side Belt R. Co. 151 Fed. 125, 11 LRANS 1145.
10. Singleton v. Benton, 114 Ga. 40 SE. 811, 58 LRA. 181, 2 Am. & Eng. Enc. Law. 2nd ed. p. 558.
1. Harrington v. Brown, 9 Allen (Mass.) 579;
Buckwalter v. U. S. 11 Serg. & R. (Pa.) 193;
Reg. v. Blakemore, 14 Q. B. 544, 68 ECL. 544, 117 Reprint 210.

parties are desirous of obtaining a conclusive decision on matters in controversy between them. The proceeding in arbitration is quasi judicial, and there must be substantial adherence to certain rules in order to effect a valid award. An appraisement, valuation or reference contemplates that the appraiser shall act upon his own initiative and investigation, without holding hearings or receiving evidence from the parties.[2] There are instances where the Courts have noted a distinction without a difference between arbitration and appraisement,[3] but the weight of authority is that an arbitration partakes of the nature of a judicial act, whereas an appraisement is ministerial in scope and nature.

II. SUBMISSION.

§7. **Submission Defined**—A submission to arbitration is a contract between two or more persons whereby they agree to submit a dispute or difference to one or more arbitrators, and to be bound by the decision of such arbitrator or arbitrators.[4] Without a submission in some form there can be no valid award.[5] The submission may be in writing, under seal, or by parol.[6]

§8. **Who May Submit**—(a) Any person capable of contracting may submit to arbitration any dispute or difference concerning which he has control of the subject matter.[7]

(b) An infant, being without legal capacity to make a contract, cannot be bound by a submission to arbitrate.[8]

(c) An agent, having general authority to bind his principal in other matters, has no authority to submit to arbitration for or on behalf of his principal.[9] And if, without specific authority so to do, an agent attempts to bind his principal and submits a matter affecting the rights of his principal he will be bound himself by the award.[10] If, however, the principal participates in the arbitration without protest, or if after award he ratifies the award, in whole or in part, he will be bound.[1]

(d) A partner cannot bind the co-partnership by a submission[2]

2. Seabree v. Chicago Board of Education, 254 Ill. 438, 446, 98 NE. 931.
3. Van Cortlandt v. Underhill, 17 Johns (N. Y.) 405.
4. District of Columbia v. Bailey, 171 U. S. 161, 18 SCt. 868, 43 L. ed. 118, 6 Am. R. 486; Morse on Arb. and Award, p. 3.
5. The Glencairn, 78 Fed. 379; Cherokee Nation v. U. S. 40 CtCl. 252.
6. Russell on Arbitration, p. 51.
7. Wyatt v. Benson, 23 Barb. 327; Brady v. Mayor of Brooklyn, 1 Barb. 584.
8. Morse on Arb. and Award, p. 4.
9. Morse on Arb. and Award, p. 11.
10. Id.
1. Morse on Arb. and Award, p. 13.
2. Hutchins v. Johnson, 12 Conn. 376.

unless he be authorized to do so,[3] and if he submits co-partnership matters to arbitration, an award made thereunder will be valid against himself although it will not be good against his co-partners.[4]

(e) A corporation, like any natural person having capacity to contract, may submit to arbitration by its duly qualified officers or specially authorized agent.[5]

(f) An executor or administrator, in his official capacity, may submit to arbitration demands for or against the estate[6], and an award will bind him in his fiduciary capacity.[7] An administrator, having no control over the realty of the estate, is without power to bind the estate by a submission.[8]

(g) A guardian has a general authority to submit on behalf of his infant ward.[9] But a guardian *ad litem* has no power to submit, even though the submission be made a rule of court.[10]

(h) A bankrupt submitting to arbitration cannot bind the assignees or the estate,[1] but he may become personally liable for costs awarded against him.[2]

(i) Assignees in bankruptcy may submit in their official capacity and bind the estate and themselves in their official capacity.[3]

§9. **Nature of Submission**—The submission may be general in character to one or more arbitrators, in which case the arbitrators assume general jurisdiction of the entire subject matter, embraced in all matters in dispute, and may render their award upon all points of possible difference whether of law or of fact.[4] Or it may be limited in scope, thereby restricting the arbitrators to the issues included in the submission. And the submission must be of an existing difference or dispute, for it is a well settled rule that arbitrators do not derive jurisdiction of disputes arising subsequent to the submission of a definite proposition.[5]

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3. Hutchins v. Johnson, 12 Conn. 376.
4. Morse on Arb. and Award, p. 9.
5. Morse on Arb. and Award, p. 5.
6. Russell on Arb., p. 29.
7. Wheatley v. Martin's Admr., 6 Leigh. 62
8. Bridgham v. Prince, 33 Me. 174.
9. Morse on Arb. and Award, p. 25.
10. Id.
1. Morse on Arb. and Award, p. 30.
2. Id.
3. Id.
4. Karthaus v. Yllas y Ferrer, 1 Pet. (U. S.) 222, 7 L. ed. 121; Parsons on Contraets, 191; Story on Partnerships, §§114-116; Russell on Arb., p. 20.
4. U. S. v. Chicago, ete. R. Co., 34 Fed. 471; Ryan v. Dougherty, 30 Cal. 218.
5. Omaha v. Omaha Water Co., 218 U. S. 180, 36 615, 54 L. ed. SCT. 991; 48 LRANS 1084.

§10. **Submission Creates Special Jurisdiction**—The submission creates the special jurisdiction of the arbitrator and it is an express limitation upon him.[6] If he enlarge upon its scope and attempt to dispose of collateral matters not properly and regularly before him in the submission it will be an usurpation of authority and power which will be curbed by the courts in adjudging void an award that attempts to decide extraneous issues.[7] This proposition cannot be stressed too greatly, for herein is the very foundation of the jurisdiction established in the arbitrator by the submission, and upon its complete understanding and proper application depend the force and effect of an award. For it will be fatal to the enforcement of an award, if the arbitrators exceed the authority especially granted to them, and such an award will be avoided by a court.[8] To illustrate further: A and B submit to three arbitrators the sole question of whether A made a certain shipment of goods within the time specified in their contract, and the arbitrators decide that it was so made, but make award in favor of B and excuse him from performance of his part of the contract, i. e., acceptance of the goods, because A had failed to insure the shipment for B's account. A court will set aside such award as being beyond the special jurisdiction created by the submission.

§11. **Submission in Writing**—When a submission is in writing it may be modified, enlarged or revoked by a writing.[9] There are instances where the courts have declared that a written submission may be altered orally, but the weight of authority is the contrary.[10]

§12. **Oral Submission**—A submission may be made orally, and may similarly be modified, enlarged or revoked.[1] The difficulty of an oral submission and alteration thereof is one of ascertaining its scope and the intent of the parties. The evidence of an oral submission must be of the highest order.[2]

§13. **Fixing of Time for Award in Submission**—Where the submission fixes a time in which the arbitrators must make their award, the award must be published within the specified period.[3] It having been shown that the submission creates the jurisdiction of the arbitrators, a time for the making of award, if stated therein, is a further limitation upon the arbitrators, and the failure of the arbitrators to

6. Toledo Steamship Co. v. Zenith Transportation Co., 184 Fed. 391, 106 CCA. 501.
7. Robinson v. Morse, 29 Vt. 404.
8. Id.
9. Titus v. Scantling, 4 Blockf.89; Byrd v. Odem, 9 Ala. 755.
10. Efner v. Shaw, 2 Wend. 567; McNear v. Bailey, 18 Me. 251; Morse on Arb. & Award, p. 63.
1. Fooks v. Lawson, 1 Marv. (Del.) 1151, 40 A. 661.
2. Copeland v. Hall, 29 Me. 93; Houghton v. Houghton, 37 Me. 72.
3. Johnson v. Crawford, 212 Pa. 502, 61 A. 1103; Jordan v. Lobe, 34 Wash. 42.

act within the prescribed time will have the effect of nullifying an award made subsequently, the same as if the arbitrators were to enlarge the power granted to them by the submission.

§14. **Extension of Time**—The time in which the arbitrators may make an award under a written submission may be extended by agreement of both parties to the submission, and such extension must be in writing.[4]

§15. **Agreement to Submit**—An agreement to submit to arbitration a dispute arising out of a contract will not be specifically enforced by the courts,[5] except where the statutes, as in England, Canada and other countries as well as New York, cure the defect of the common law. In the commercial world, this is a serious impediment to the security and sanctity of contracts and the safeguarding of business. While recognizing the so-called "arbitration clause" in contracts in daily use, merchants are faced with the knowledge that such a clause cannot be enforced, (except in New York, as noted). This rule was early laid down by dictum by Coke in the Vynior case, and has been universally followed in the various jurisdictions of the United States and England, until in the latter, by statutory enactment, such agreements are enforceable; and in New York the statute of 1920, fully reprinted in the Appendix[6] of this work, makes such agreements irrevocable.

The reason that an agreement to arbitrate will not be specifically enforced is that the parties by their own act may not oust the courts of their ordinary jurisdiction.[7] It may be remarked parenthetically that there is a decided tendency in many jurisdictions to overcome the common-law defects by legislative enactment, but the rule of the common law obtains in the absence of statute.

§16. **Submission as a Condition Precedent**—A submission may be made a condition precedent to the right of action,[8] in which case it must be made, or every effort advanced to bring it about.[9] Thus, if in an insurance contract it be stipulated that the amount of damage shall be determined or fixed by arbitrators, submission to such arbitration is a condition precedent to recover on the agreement.[10]

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4. Johnson v. Crawford, 212 Pa. 502, 61A 1103; Jordan v. Lobe, 34 Wash. 42, 74 P. 817.
5. Tudor v. Reck, 4 Mass. 242; Kinney v. Baltimore & O. Employees Assn., 35 W. Va. 385, 14 SE. 8, 15 LRA. 142; Hartford F. Ins. Co. v. Hon., 66 Neb. 553, 92 NW. 746, 60 LRA. 436.
6. See Appendix.
7. Vynior's Case, 8 Coke 82, 8 ERC. 357, 2 Am. & Eng. Enc. Law, 2nd Ed. p. 600.
8. Dickson Mfg. Co. v. Am. Loco. Co., 119 Fed. 488; N. Y. Mut. F. Ins. Co. v. Alvord, 61 Fed. 752; 9 CCA. 623; Russel on Arb., p. 51.
9. Lawrence v. White, 131 Ga. 840, 63 SE. 631, 19 LRANS. 966, 15 Am. Cas. 1097.
10. Delaware etc. Canal Co. v. Penns. Coal Co., 50 N. Y. 250-268; Campbell v. American Peoples Life Ins. Co., 8 D. C. 245, 29 Am. R. 591.

Morse, at page 93, says:

> "Or the stipulation may be, to pay such sum as a third person shall determine to be just; or it may be, that work shall be done or materials furnished, to the satisfaction or acceptance of a third person; or that the price to be paid shall be dependent upon his decision as to the quantity, quality, or price of the materials or workmanship. In each of these cases the action of the third person must take place before the right to sue can mature. The duty of procuring the decision of the referee in cases like the foregoing rests primarily upon the party who will have the claim for payment; i. e., upon the plaintiff in the suit to be brought after the right of action shall have accrued. He must use his best exertions to bring about and perfect the agreement of reference. And it seems that his failure to bring it about will enable him to institute suit without it, only in case the obstacle to his success has grown out of the contumacious action of the other party. The debtor cannot, by preventing the perfection of the reference, escape the liability to be sued."

III. REVOCATION OF SUBMISSION.

§17. **By Operation of Law**—Revocation of a submission in law arises from the legal effect and necessary consequences of some intervening event, either happening after submission, or caused by the act of the parties, necessarily putting an end to the business.[1] The total destruction and final end of the subject matter will operate to revoke a submission in respect to it.[2]

§18. **By Death of a Party**—The death, before award, of a party to a common law submission is a revocation of the submission by operation of law.[3]

The rule is otherwise if there is a stipulation that the submission shall survive.[4]

§19. **Lunacy of Party**—The lunacy of a party after submission and before award is a revocation of the submission by operation of law.[5]

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1. Toledo Steamship Co. v. Zenith Transportation Co., 184 Fed. 391, 106 CCA. 501; Calif. Academy of Sciences v. Fletcher, 99 Cal. 207, 33 P. 855.
2. Id.
3. Gregory v. Boston Safe Deposit, etc. Co., 36 Fed. 408.
4. Dawse v. Coxe, 3 Bing. 20, 11 ECL. 20, 130 Reprint 420.
5. Williams v. Banning Mfg. Co., 153 N. C. 7, 68 SE. 902, 31 LRANS 679.

§20. **By Death of Arbitrator**—Where there is no provision in the submission for filling a vacancy, the death of an arbitrator revokes the submission.[6]

§21. **By Refusal of Arbitrator to Act**—The refusal of an arbitrator to act operates as a revocation.[7]

§22. **Bankruptcy of a Party**—Bankruptcy of a party to a submission of itself does not revoke a submission,[8] but it is the rule that any award subsequently made would not bind the assignee in bankruptcy.[9] On the theory of a lack of mutuality, bankruptcy may entitle the solvent party to revoke, as the property has passed out of the control of the bankrupt.[10]

§23. **By Suit Involving Same Subject Matter**—An action brought, after submission and before award, involving the parties and the same subject matter, will operate as a revocation.[1]

§24. **Formality of Revocation**—The formality of the revocation must follow and conform with the formality of submission. Thus, if the submission be under seal, so also must the revocation; if the submission be in writing, the revocation must be written; but if the submission be only verbal, then the revocation may be verbal also.[2]

§25. **Time of Revocation**—A submission not made a rule of court may be revoked at any time before award of the arbitrators.[3] After award neither party can revoke the submission,[4] for the arbitrators have finished their business.

§26. **Notice of Revocation**—The party revoking a submission must give notice of the revocation to the arbitrators or one of them.[5] It will not be sufficient for one of the parties to write a revocation; it must be given to the arbitrators or one of them.[6]

IV. ARBITRATOR.

§27. **Arbitrator Defined**—An arbitrator is a private extraordinary judge, chosen by the parties in dispute, invested with power to decide same.[7]

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6. Williams v. Banning Mfg. Co., 153 N. C. 7, 68 SE. 902, 31 LRANS 679.
7. Parsons v. Ambos, 121 Ga. 98, 48 SE. 696; Grosvenor v. Flint, 20 R. I. 21, 37 A. 304.
8. Andrews v. Palmer, 4 B. & Ald. 250, 6 ECL 471, 106 Reprint 929.
9. Marsh v. Wood, 9 B. & C. 659, 17 ECL. 296, 109 Reprint 245.
10. Id.
1. Nurney v. Firemens Fund Ins. Co., 63 Mich. 633, 30 NW. 350, 6 Am. SR. 338.
2. Morse on Arb., p. 232; Barker v. Lees; 2 Keb. 64, 84 Reprint 41; Vynior's case, 8 Coke 72, 77 Reprint 597, 3 ERC. 357.
3. Parsons v. Ambos, 121 Ga. 98, 48 SE 696.
4. Toledo Steamship Co. v. Zenith Transportation Co., 184 Fed. 391, 106 CCA. 501.
5. Brown v. Leavitt, 26 Me. 251; Williams v. Banning Mfg. Co., 153 N. C. 7, 68 SE. 902, 31 LRANS 679.
6. Morse on Arb., p. 231.
7. Burchell v. Marsh, 17 How. 344, 15 L. ed. 96; Garred v. Macey, 10 Mo. 161; Cushing v. Babcock, 38 Me. 452.

§28. **Qualification of Arbitrator**—An arbitrator, being the selection of the parties themselves is not required to have any especial qualification for the position unless certain qualifications are specified in the submission.[8] In earlier times there was a question and much judicial discussion as to whether woman was qualified to act as arbitrator, but the question was resolved in favor of her full eligibility to so serve, and in all jurisdictions woman is qualified as an arbitrator,[9] and it makes no difference if she be feme sole or feme covert.[10]

Infants,[1] persons excommunicated,[2] outlawed persons,[3] deaf and dumb persons,[4] ministers of governments,[5] members of ecclesiastical courts,[6] committees of trade bodies,[7] fluctuating, unincorporated societies,[8] and sheriffs[9] are competent to act as arbitrators.

§29. **An Arbitrator the Agent of the Parties**—An arbitrator in a sense is the agent of *both* parties.[10] But this requires some qualification. An arbitrator bears the relationship of an agent to *both* parties in the sense that either or both may revoke the submission to the arbitrator, but an arbitrator has greater power than a general agent, and in his representative capacity may have power beyond that of only one party. And since an arbitrator, by his award, may direct a party to do or refrain from a certain thing it would seem that he is invested with a power higher than that of agency. It has been said that an arbitrator is no more an agent of the parties than a court is such an agent, but there is this manifest difference—the authority of the arbitrator is revocable by one or both parties before award, while the power of the court cannot be taken away by the parties so long as there is jurisdiction of the issue.

§30. **Appointment of Arbitrator**—An arbitrator is designated or appointed by the parties, and an arbitration is not begun until the arbitrator so named has accepted the office.[1] If the submission is to more than one arbitrator all must accept. If the submission is to two named arbitrators and that they shall designate a third, the third

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8. Russell on Arb. and Awards, p. 115.
9. Evans v. Ives, 15 Phila. (Pa.) 635.
10. Id.
1. 1 Bacon on Arb. and Award, 317 D.
2. Id.
3. Id.
4. McMillon v. Allen, 98 Ga. 405, 25 SE. 505.
5. Gernon v. Cochran, 10 F. Cas. No. 5368, Bee 209.
6. Poggenburg v. Conniff, 67 Sp. 845.
7. Vaughn v. Herndon, 9 Tenn. 17 SW. 793.
8. Rathven v. Elgin, L. R. 2 H. L. §535.
9. Sharp v. Dusenburg, 2 Johns Cas. (N. Y.) 117.
10. Culver v. Askley, 19 Pick. (Mass.) 300.
1. Re Taylor, etc. R. C. 23 Man. 268.
   Reid v. McElderry, (Ala.) 66 S 7.

arbitrator so named must likewise accept. If the submission is to two named arbitrators who are empowered to select an umpire in case of disagreement of the two, the necessity for and time of appointing the umpire depends upon whether the arbitrators disagree as to their award. An umpire, may be appointed at the outset in order to avoid the necessity of rehearing the evidence or he may be selected upon failure of the arbitrators to agree. In any event, an umpire, properly such, signs his award alone.[2]

Umpire—An umpire is distinguished from a third arbitrator, who participates with the other arbitrators and makes a joint award, in that an umpire acts alone in making his award.

§31. **Arbitrator Must Be Disinterested and Impartial**—The first essential requirement of persons acting in the capacity of arbitrators is that they shall be disinterested in the matter under submission and be judicially impartial as between the parties.[3] Having assumed a *quasi* judicial position, it is incumbent upon arbitrators to maintain their impartial attitude throughout the hearing, examination and investigation of proofs, and the taking of testimony. If an arbitrator be biased, or has expressed an opinion adverse to the interests of a party to the submission, or in any manner acted prejudicially to the rights of a party, an award made by or participated in by such arbitrator may be avoided for misconduct.[4] Therefore, it follows that while he may have been designated and appointed by one party, an arbitrator must never be an *advocate* for such party but must act in a judicial manner.[5] This does not mean that, upon closing the proofs and when the arbitrators shall have met to make their award, an arbitrator is precluded from expressing his own views or opinion honestly arrived at in the light of the evidence adduced.

That an arbitrator shall be wholly disinterested in the outcome of the issue requires some qualification. Thus, if the arbitrator has an interest in the matter under submission and such interest is known to the parties, the fact of his interest will not disqualify him from acting nor avoid an award which he may make or in which he may participate.[6] The misconduct ascribable to an interested arbitrator may be said to be the concealment of interest from a party to the submission.

The relationship of an arbitrator by affinity or consanguinity[7]

2. Hartford F. Ins. Co. v. Bonner Merc. Co., 44 Fed. 151; 11 LRA. 623.
3. Harvey v. Shelton, 7 Beav. 455, 29 Eng. Ch. 455, 49 Reprint 1141. Vineburg v. Guirden F. etc. Assn. Co. 19 Ont. A 293.
4. Silver v. Connecticut River Lumber Co., 40 Fed. 192.
5. Western Female Seminary v. Blair, 1 Disn. (Oh) 370-79.
6. Strong v. Strong, 12 Cush. (Mass.) 135.
7. Pool v. Hennessey, 39 Iowa 192, 18 AmR. 44.

to one of the parties may raise a doubt as to his eligibility to serve, particularly if the relationship is unknown to the other party, and it has been said that the court will closely scrutinize the acts of an arbitrator whose relation to the party is such as to naturally influence the judgment even of an honest man.[8] It has been held that the relationship of an arbitrator to an officer of a company, party to the submission, was not sufficient to avoid an award.[9]

§32. **Business Relations of Arbitrator and Party**—It is especially true in commercial arbitraments that an arbitrator may have business relations with a party; for the vast majority of such submissions usually are participated in by arbitrators and parties who at some time or other of necessity have been or will be in close business contact. Frequently, a party submitting to arbitration will appoint a competitor, or one with whom he has had dealings and in whose judgment and integrity he has confidence. Unless the business relations between the arbitrator and a party to a submission is of such a nature as to directly influence the arbitrator's award, the award will not be voidable. But if the business relations are such as to prejudice the arbitrator in favor of one party and to the detriment of another, an award so procured will be avoided on the theory of constructive misconduct.

The fact that an arbitrator is an employee of a party,[10] or has acted as an arbitrator in other submissions of a similar nature and made an award in favor of that party,[1] or bears the relationship of landlord[2] or tenant,[3] or that the arbitrator was a creditor[4] or debtor[5] of a party, of itself will not avoid an award. It is the weight of authority that such relations must be shown to have been actually prejudicial to a fair hearing and honest award, based upon the proofs and evidence, in the judgment of the arbitrator, before an award so made will be avoided.

§33. **Oath of Arbitrator**—Under a common-law submission arbitrators need not be sworn.[6] But if the submission itself stipulates that the arbitrators shall be sworn, the stipulation must be strictly followed.[7]

§34. **Substitution of Arbitrator**—Neither party to an arbitration has the right to substitute an arbitrator in place of one already

8. Sweet v. Morrison, 116 N. Y. 19, 22 NE. 276, 15 Am. S. R. 376.
9. Benning v. Atlantic etc. R. Co., 6 Montr. Q. B. 385.
10. Martinsburg etc. R. Co. v. March 114 U. S. 549, 5 SCt. 1035, 29 L. ed. 255.
1. Stemmer v. Scottish Union etc. Ins. Co., 33 Or. 65-73, 49 p. 588.
2. Fisher v. Towner, 14 Conn. 26.
3. Id.
4. Bullman v. North British etc. Ins. Co., 159 Mass. 118, 34 NE. 169.
5. Anderson v. Burchett, 48 Kan. 153, 29 p. 315.
6. Gardner v. Newman, 135 Ala. 522-26, 33 S. 179.
7. Lilley v. Tuttle, 52 Colo. 121-28, 117 P. 896, Amer. Cas. 1913 II. 196.

named without the consent of the other party.[8] Nor have the arbitrators themselves the power of substitution.[9] Thus, where there is no provision in the submission itself for filling a vacancy, the death of an arbitrator acts as a revocation of the submission and the remaining arbitrator or arbitrators have no power to name his successor.[10]

V. PROCEDURE IN ARBITRATION.

§35. **Notice of Time and Place of Hearing**—Having accepted their office, arbitrators constitute a tribunal, selected by the contending parties, which in its nature is judicial, and we may now inquire into the duties of arbitrators, the first of which is to appoint a time and designate a place of meeting at which the parties shall be heard. Both parties must be given notice.[1] The want of notice is treated as something akin to a want of service on a defendant in an action at law without notice to the parties.[2] It is considered that the arbitrators have no jurisdiction in such a case to hear and determine the cause submitted to them, and as a want of jurisdiction is good as a defense to a judgment at law, so is the plea of a want of notice a good defense to an action upon an award.[3]

The weight of authority fixes the duty of giving the requisite notice to the parties upon the arbitrators. This notice must be definite and certain of the time and place, although it need not be written.[4]

As to time, a party must have reasonable notice of the hearing in order that he properly may prepare for same and have the opportunity to prepare and submit his case.[5] In this connection it has been said that whether a notice was reasonable depends altogether upon the circumstances of the case, and becomes a mixed question of law and fact, proper for the consideration of a jury.[6]

In general, notice to the attorney of a party is not notice to the party,[7] unless the submission so stipulates, or it may be shown that the party had been for a long time out of the state and his residence was unknown, and that in all the proceedings the party had acted by counsel without personal appearance.[8]

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8. McCawley v. Brown, 12 B. Mon. (Ky.) 132.
9. Elberton Hordrone Co. v. Hanes, 122 Ga. 858, 50 SE. 964.
10. See Death of Arbitrator, § 20, supra.
1. Lutz v. Linthicum, 8 Pet. 165, 8 L. ed. 904;
   Continental Insurance Co. v. Garrett, 125 Fed. 589-91, 60 CCA. 395;
   Curtis v. Sacramento, 64 Cal. 102, 28 P. 108.
2. Truesdale v. Shaw, 58 N. H. 207; 2 Story Eq. Jur. 1452.
3. Id.
4. Emerson v. Udall, 8 Vt. 357-363;
   Vessel Owners Towing Co. v. Taylor, 126 Ill. 250.
5. Morewood v. Jewett, 25 N. Y. Sup. 496;
   Passmore v. Pettit, 4 Dall. (Pa.) 271, L. ed. 830.
6. Emerson v. Udall, 8 Vt. 357-363.
7. Rivers v. Walker, 1 Dall. (Pa.) 81, 1 L. ed. 46.
8. Crazier v. Blackstock, 1 Del. 362.

The rule is different where by the submission itself no hearing is contemplated, but the arbitrators are to meet for the purpose of determining upon their award. Thus, where the parties had agreed to submit a dispute to the determination of an arbitration committee of a designated exchange, and the submission was whether a certain commodity was of the grade and quality described in a certain contract, the arbitration committee of the organization designated in the submission met and made its award. The losing party objected to the award on the ground (1) that he had no notice of the hearing and (2) that he did not appear and present any evidence.

Held, The parties having agreed that the difference between them be arbitrated, and decided by the arbitration committee of the exchange according to the rules and regulations of such exchange, which provided for no notice to either party of the time and place of hearing, and the terms of submission providing for no notice, and it having been shown that the committee in making the award acted in accordance with the rules of the exchange, the award was not void because no notice was given to the defendant of the time and place of action by the committee on the matter, nor because the defendant did not appear and submit evidence in its behalf.[9]

§36. **All Arbitrators Must Be Present**—As a general rule, all the arbitrators named in the submission must be present at the hearings, although only a majority may participate in and sign the award.[10] Absence on the part of any one to whom submission is made will make the award voidable. If the submission stipulates that *all* the arbitrators named therein shall make the award, a lesser number making the award will avoid it.[1] And if the submission requires that a *majority* may award it is not necessary that all shall sign, but all must be present during the hearings, and the weight of authority is that all must be present during the deliberations of the arbitrators, on the theory that a party is entitled to the influence and the exercise of judgment on the part of all arbitrators, even though one of them may disagree with the majority.[2]

§37. **Arbitrators Must Hear the Evidence**—Arbitrators are bound to receive evidence pertinent to the issue, else their award will be voidable.[3] They may limit the scope of the testimony of a witness and place restrictions upon his examination, but so long as the limita-

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9. Blakely Oil, etc. Co. v. Procter & Gamble Co., 134 Ga. 139, 67 SE. 389; Hughes v. Sarpy County, 97 Neb. 90, 149 NW. 309.
10. Emery v. Owings, 7 Gill (Md.) 488; 48 An. D. 580.
1. Omaha v. Omaha Water Co., 218 U. S. 180, 30 SCt. 615, 54 L. ed. 991, 48 LRANS. 1084.
2. Bannister v. Read, 6 Ill. 92.
3. Roberts v. Consumer's Can Co., 102 Ind. 362, 62 A. 585, 11 Am. SR. 377.

tion and restriction are honestly fixed and made and while so made embrace all of the issues under submission, their act will not be questioned by a court.[4]

The duty of producing the evidence devolves upon the parties, for it is not the function of arbitrators to seek it or to discover it by their own initiative or industry. However, arbitrators are not obliged to confine themselves to matter which is offered by the parties themselves. In their search for the truth, they may obtain the views of experts,[5] and so long as they remain within the scope of the submission and decide the issue on their own honest judgment, their award will be valid.

It may be stated as a well established rule that, unless it is the clear intent of the submission that no hearing shall be held by the arbitrators in the presence of the parties, both parties are entitled to be present at all hearings, examination of witnesses, and likewise shall have equal opportunity of questioning witnesses.[6] Arbitrators, while enjoying powers of unusual latitude, may not arrogate to themselves the power of denying a fair and full hearing as to all the material issues under submission. So also arbitrators may not receive ex parte statements or communications from one party without communicating them to the other, and it has been held that a communication from the attorney of one party to one of three arbitrators, of which the adverse party was not apprised, was cause for avoiding an award.[7]

§38. **May Adjourn Hearing**—Arbitrators may adjourn the hearing from day to day and from time to time, but notice of the time and place of the next hearing must be given the parties.

It may be said that arbitrators must adjourn a hearing on good cause shown by a party, but a party will not be permitted to prolong a hearing beyond the time fixed in the submission for making award.[8] Otherwise an award made beyond the time limit would be voidable as being made beyond the jurisdiction of the arbitrators, and a party by dilatory tactics could defeat the submission. A party seeking to defeat an award has the immediate remedy of revocation of submission, which, as already noted, may be done at any time before award, upon due notice to the arbitrators. This is especially true of common-law submissions, even though the rule be different under submissions under statute.

4. Campbell v. Western, 3 Paige (N. Y.) 124;
Com. v. La Fitte, 2 Serg. & R. (Pa.) 106;
In re Small, 23 Ont. A. 543-46.
5. Stone v. Baldwin, 226 Ill. 338, 80 NE. 890.
6. Blakeley Oil etc. Co. v. Procter & Gamble Co., 134 Ga. 139, 67 SE. 389.
7. Hewitt v. Reed City, 124 Mich. 6, 82 NW. 616, 50 LRA. 128.
8. Weir v. West, 27 Kan. 650.

§39. **Powers of Arbitrators**—In general, arbitrators have a wide latitude in their deliberations and it may be said that within the scope of their jurisdiction, which is defined by the submission, they have power, virtually unlimited, to fix upon their own method of procedure, and so long as it does not transcend the principles of equity and good conscience, and insures to both parties a fair and just hearing, they will have fulfilled the requirements of their judicial office.

As to the procedure of arbitrators, it may be stated in a general way that the parties, having created their own forum, cannot plead laxity on the part of their creature if they do not insist upon compliance with the technical procedure fixed by the rules of law for the guidance and protection of parties who invoke this method of settling their differences. The settlement of disputes by arbitration being favored by the courts,[9] every reasonable intendment will be indulged in to give effect to such proceedings.[10]

VI. AWARD.

§40. **Award**—The award is the judgment of the arbitrators.[1] At common-law it is the basis of an action[2] or a good defense thereto,[3] and is not entitled of itself to be made the judgment of court.[4] The essential requirements of an award are that it be certain,[5] final,[6] conclusive[7], determinative of the issue,[8] free from procurement by fraud,[9] collusion,[10] or misconduct[1] on the part of arbitrators. It is likewise vital that it shall be confined to the jurisdictional limitations of the submission and not seek to determine or settle issues beyond the submission.[2]

To illustrate: A and B have a controversy concerning deliveries under a contract, B maintaining that A had breached the contract because of his failure to ship goods within a specified time. The controversy is submitted by the parties for determination of the single issue. Under the terms of such a submission the arbitrators must

9. Houston & T. C. R. Co. v. Newman, 2 Tex. App. Civ. Cas. (Willson) 303; Western Female Seminary v. Blair, 1 Disney (Ohio) 370.
10. Toledo S. S. Co. v. Zenith Transportation Co., 106 CCA. 501, 184 Fed. 391.
1. Garr v. Gomez, 9 Wend. 649.
2. Webb v. Zeller, 70 Ind. 408; Dilks v. Hammond, 86 Ind. 563.
3. Morse on Arb. and Award, p. 574, Turner v. Stewart, 51 W. Va. 493, 41 SE. 924.
4. In re. Kneiss, 96 Cal. 617, 31 p. 740.
5. Connor v. Simpson, 104 Pa. 440; Akely v. Akely, 16 Vt. 450.
6. Russell on Arb. 3rd ed. p. 269; Whitcher v. Whitcher, 49 N. H. 176, 6 Am. R. 486.
7. Akely v. Akely, 16 Vt. 450.
8. Id.
9. Emerson v. Udall, 13 Vt. 477.
10. Strong v. Strong, 9 Cush. (Mass.) 560.
1. Worley v. Moore, 77 Ind. 567.
2. Garr v. Gomez, 9 Wend. (N. Y.) 649;
Consolidated Water Power Co. v. Nash., 109 Wis. 490, 85 NW. 485.

decide only the especial point raised thereby. If they attempt to include collateral matter their award will be voidable. It follows as of course that if the submission be general in character, as "the question of time of shipment of goods under contract and all matters in dispute between A and B", the arbitrators may go into all collateral and incidental questions of the dispute, whereby they may decide on all features within the four corners of the contract out of which the controvery arose.

An award must be certain and final as to its terms, for that which is uncertain or ambiguous cannot be determinate of an issue, and such an award will be avoided. Since the purpose of arbitration is to put an end to controversy, if an award, instead of settling the matter submitted, creates further doubt the parties have been hindered rather than helped toward a settlement. Therefore, it is incumbent upon arbitrators to make their award not only entirely understandable but certain and definite as regards the thing to be done by the parties carrying out the award.[3]

An award should be conclusive. If such be the issue, it should fix the amount of damages to be paid by one party to another, and should not require any other material act to be done by the parties beyond the performance of the award. If interest be awarded the rate of interest should be stated, and it is feasible for arbitrators to compute the exact amount of interest to be paid. But the mere failure of arbitrators to compute interest of itself is neither uncertain nor inconclusive, for that being a simple matter of arithmetic, the courts, being mindful that arbitrations are intended to do substantial justice and equity between the parties, give every reasonable intendment to an award and the neglect of computing interest will not be fatal.[4]

An award need not follow strict rules of law,[5] but where an award presumes to decide the law an error of law on its face will be ground for vacating it.[6] If an award be within the submission and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court will not set it aside for error either in law or fact.[7]

§41. **Award in Alternative**—An award in the alternative, which gives a party an election of remedies is not uncertain nor lacking in finality.[8] Nor is an award inconclusive which requires one party to perform an act before the other shall be bound.[9]

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3. Lyle v. Rogers, 5 Wheat. 394, 5 L. ed. 117.
4. Noyes v. McLafin, 62 Ill. 474.
5. Burchell v. Marsh, 17 How. 344, 15 L. ed. 96.
6. Thornton v. Carson, 7 Cranch 596, 3 L. ed. 451.
7. Id.
8. Morse v. Stoddard, 28 Vt. 445.
9. Thompson v. Miller, 15 Weekly Rep. (Eng.) 353.

§42. **Arbitrators Must Publish Award**—The duty of publishing their award devolves upon the arbitrators.[10] If the submission be oral the award may be oral.[1] If the submission is written the award must be in the same form.[2] There is no especial method prescribed for publishing the award, it being sufficient that it be brought to the knowledge of both parties. Thus it may be delivered to one of the parties and by him delivered to the adverse party. But prudent private arbitrators will give copies of their award to both parties at the same time whenever possible. Usually trade associations are at pains to acquaint the parties simultaneously with the award.

VII. ENFORCEMENT OF AWARD.

§43. **Basis of Action or Defense Thereto**—At common law, an award is the foundation or basis of an action or a defense thereto, and can only be enforced by a proceeding thereon.[3] An award must be specially pleaded.[4] It is not entitled of itself to be made a judgment of court, but must be proceeded upon as any other executed contract.[5]

Where a common-law award has been made, the stipulation of the parties that it may be entered as the judgment of the court will not be given effect by a court, and where such award has been entered by the clerk in the judgment roll, the court will not set aside the award, although all proceedings on the judgment may be enjoined.[6] This because where a method of arbitration is provided by statute there must be substantial compliance with the statutory provisions, and private parties may not invent a procedure of their own which contravenes the law, and thereafter expect the courts to extend the protection of statutory law to them. While the prevailing party may have his cause of action on the common-law award, he cannot obtain a judgment of the court by the mere entry of such an award on the judgment roll of the clerk, as is the case under many statutes.

§44. **Submission Must Be Proved**—In an action on an award, the submission must be proved as every other contract.[7]

VIII. AVOIDING AWARD.

§45. **Award Subject to Review of Court**—A common-law award is like unto any executed contract, and is subject to the same review

10. Morse on Arb. and Award, p. 285.
1. Banert v. Eckert, 2 F. Cas. No. 837, Wash. 325.
2. Brazill v. Isham, 12 N. Y. 9.
3. Morse on Arb. and Award, p. 574.
4. Piercy v. Sabin, 10 Cal. 30, 70, Am. Dec. 692.
5. Sisson v. Pittman, 113 Ga. 166, 38 SE. 315; In re Kreiss, 96 Cal. 617, 31 P. 740.
6. In re Kreiss, 96 Cal. 617, 31 P. 740.
7. Morse on Arb. and Award, p. 285.

and construction by the courts, and may be reformed, segregated or altogether avoided, depending upon the *res gestae* of each case. There are, however, certain general rules, applicable to all contracts, which govern the law of awards. Of these, the first may be said to be if an award arise out of an illegal contract it will be void *ab initio* and not merely voidable, for the courts will not make legal that which the law declares illegal. Thus an award against public policy would be a nullity.[8]

It may be stated as a general proposition that an award will be avoided on any of the following grounds: (1) want of jurisdiction in the arbitrators, i. e., if they have presumed to decide questions beyond the express limitations of the submission;[9] (2) for fraud;[10] (3) for collusion;[1] (4) for misconduct on the part of an arbitrator;[2] (5) for gross error;[3] (6) for mistake in the description of some person or property therein vital to the issue;[4] (7) for uncertainty;[5] (8) when impossible of performance.[6]

First, as to want of jurisdiction in the arbitrators: The submission creates the special jurisdiction of the arbitrators, and the award necessarily must conform thereto, else it cannot be considered valid. This is true not only of the subject matter of the submission, but as to the time of making the award. If the submission specifies a time in which arbitrators shall make their award, failure on their part to act within that time will make any subsequent award void[7] for the time is as much a jurisdictional matter as the other features of the submission.[8] In other words, upon the expiration of the time fixed by the submission for making an award, the arbitrators lose their jurisdiction of the subject matter, and arbitrators themselves may not enlarge upon the time any more than they may extend the scope of the submission itself. The parties may extend the time or modify or alter the submission, but it is not within the power of the arbitrators so to do.[9] When no time for making the award is specified, a reasonable time is implied,[10] and what is a reasonable time depends upon the *res gestae* of each case.

8. Singleton v. Benton, 114 Ga. 548, 58 LRA. 181; Pittsburgh Construction Co. v. West Side Belt R. Co., 151 Fed. 125.
9. Republic of Colombia v. Cauca Co., 190 U. S. 524, 23 SCt. 704, 47 L. ed. 1159.
10. Strong v. Strong, 9 Cush. (Mass.) 560-74.
1. Dickinson v. Chesapeake etc. R. Co., 7 W. Va. 390.
2. Hartford F. Ins. Co. v. Bonner Merc. Co., 44 Fed. 151, 11 LRA. 623; U. S. v. Farragut, 22 Wall. 406, 22 L. ed. 879.
3. Burchell v. March, 17 How. 344, 15 L. ed. 96; Swisher v. Dunn, 89 Kan. 412-16, 131 P. 571, 45 LRANS. 810.
4. Hewitt v. Furman, 16 Serg. & R. (Pa.) 135.
5. Russell on Arb., 3rd ed., p. 275; Schuyler v. Van Der Veer, 2 Caines 235.
6. Russell on Arb., 3rd ed., p. 288.
7. Galbreath v. Galbreath, 10 Ky. L. 935.
8. Lattin v. Gamble, 154 Mich. 177, 117 NW. 575.
9. White v. Purglar, 10 Yerg. 441.
10. Haywood v. Harmon, 17 Ill. 477.

Hence, the necessity of proving the submission in an action upon an award or in pleading it in defense of such action.

Second, as to the procurement of an award by fraud: Since the law does not countenance fraud in whatever guise it is revealed, an award obtained by such means will be avoided by the courts. Concealing facts pertinent to the issue by a party,[1] the falsification of documents,[2] the false testimony of a party,[3] the corruption of an arbitrator[4] all fall within the meaning of fraud and an award surrounded by such circumstances will be rendered void.

Third, as to collusion: Being akin to fraud, collusion between a party and an arbitrator will render an award voidable.[5] Thus, a party having a secret understanding with an arbitrator whereby the adverse party is deprived of a fair and just adjudication of the issue, will be ground for avoiding an award so procured.

Fourth, as to misconduct on the part of an arbitrator: This opens up a discussion of wide latitude, and calls for some qualification. Misconduct may be wilful and therefore reprehensible, while on the other hand misconduct in a legal sense may arise in a multitude of ways and at the same time the arbitrator be not conscious of it. The interest of an arbitrator in the subject matter of a submission,[6] unknown to a party or parties, would be denominated misconduct, the same springing from the interest unrevealed; or the relationship of an arbitrator to a party,[7] unknown to the adverse party, would be in the same category. But the more common application of the term misconduct may be said to be the failure of the arbitrators to give notice of the time and place of meeting for the purpose of hearing the evidence;[8] their refusal to postpone a hearing on good cause shown;[9] their refusal to hear a witness produced by a party;[10] their refusal to permit the questioning of a witness by either or both parties;[1] receiving ex parte statements from one party and not communicating the same to the adverse party;[2]

1. Newburgport Marine Ins. Co. v. Oliver, 8 Mass. 402; Teal v. Bilby, 123 U. S. 572, 8 SCT. 239, 31 L. ed. 263
2. Id.
3. Bulkley v. Starr, 2 Day 552; Lankton v. Scott, Kirby 356.
4. Tracy v. Herrick, 25 N. H. 381; Van Cortland v. Underhill, 17 Johns, (N. Y.) 405.
5. Emerson v. Udall, 13 Vt. 477.
6. Morse on Arb. and Award, p. 100.
7. Brown v. Leavitt, 26 Maine 251;
Strong v. Strong, 9 Cush. 560.
8. Hollingsworth v. Leiper, 1 Dall. 161;
Herrick v. Blair, 1 Johns, (N. Y.) 101.
9. Passmore v. Pettit, 4 Dall, 271;
Forbes v. Frary, 2 Johns. 224.
10. Morse on Arb. and Award, p. 142.
1. Lutz v. Linthicum, 8 Peb. 165 8 L. ed. 904.
2. Moshier v. Shear, 102 Ill. 169, 40 Am. R. 573.

taking counsel of the attorney of one of the parties;[3] hearing a witness in the presence of only one party;[4] acting not upon their own volition and instigation, but under the direction of one of the parties;[5] if, after the closing of testimony, they receive evidence from one of the parties or his attorney;[6] or if one or more of the arbitrators be prejudiced against a party or had previously expressed an opinion adverse to the interests of a party.[7]

If the submission is to several arbitrators jointly, it is misconduct if all of the arbitrators do not meet together for the purpose of discussing and making their award, even though a majority only make the award and a minority refuse to participate therein.[8]

Fifth, as to gross error: The want of that diligence which even careless men are accustomed to exercise may be denominated gross error in its application to an award, and implies an inexcusable disregard and consideration of facts surrounding the matter. Since a court will not avoid an award for mere mistake of either law or fact, so long as it is honestly made by the arbitrators, it may be said that gross error is leaving that undone or unconsidered which in the ordinary course of usual events should unquestionably have been done or considered.

Sixth, as to mistake in the description of some person or property vital to the issue: It is axiomatic that an award which on its face shows a mistake in the description of some person or property vital to the issue will be avoided by the courts. For example, if the submission involves goods of a certain kind and description, an award as to goods of an entirely different kind will not be valid. Or, if a party to the submission be erroneously designated and identified in the award it is obvious that such award would be invalid. A mere clerical error or mistake in transmission, which may be readily corrected, is not sufficient to invalidate an award.[9]

Seventh, as to uncertainty: If by the award the thing or things to be done by a party or parties is not capable of understanding, a court will set aside the award for uncertainty.[10] As has been said before, the purpose of arbitration is to put an end to controversy, and if the award is uncertain in its ordinary terms it has failed of its purpose.

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3. McCausland v. Tower, 14 N. B. 125.
4. Lutz v. Linthicum, 8 Peb. 165, 8 L. ed. 904.
5. Hartford F. Ins. Co. v. Bonner Mercantile Co., 44 Fed. 151, 11 LRA 623.
6. Strong v. Strong, 9 Cush. (Mass.) 560.
7. Id.
8. Morse on Arb. and Award, p. 151.
9. Solomons v. McKinstry, 13 Johns (N. Y.) 27.
10. Morse on Arb. and Award, p. 408.

Eighth, when impossible of performance: An award requiring a party to perform that which is obviously impossible is void.

§46. **In General**—It may be stated as a general proposition that if an award shows error or miscalculation on its face, a court has no power to correct it, unless the submission be made a rule of court.[1] Also, if an award be valid as to part and invalid as to part, and the two parts are devisable, it will be reformed, but not otherwise.[2]

If an award in part exceeds the submission it will be annulled, unless the matter decided within the scope of the submission may be separated from that not properly included therein without amending or abridging the issue.[3] Since the court cannot control the scope of the submission, it will not reform an award to enlarge the submission.[4]

Where interest is allowed a party under an award, the failure to compute the amount of interest will not avoid the award for either uncertainty or inconclusiveness, the computation being a simple matter of arithmetic.[5]

If arbitrators, after the close of testimony, receive evidence from one of the parties, or from his attorney, it will be considered misconduct and sufficient cause to vacate the award;[6] and, if it be expressly agreed that neither party is to be represented by counsel, the submission of authorities by counsel for one of the parties after the close of testimony, will be a violation of the spirit of the submission, and will avoid the award.[7]

Where a trade association, chamber of commerce or exchange has a regular or standing arbitration committee, without the right of substitution thereon, and upon submission to such committee another than a regular member of the aforesaid committee is called upon and acts in place and stead of the regular member and award made by the committee so constituted will be avoided, it having been held that the proceedings of the arbitration committee were irregular and contrary to the rules of the organization. It follows that where an organization or commercial body holds itself out as having certain rules of

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1. Commonwealth v. Pejepscut Proprietors, 7 Mass. 399.
2. De Groot v. U. S. 5 Wall. 419, 18 L. ed. 700;
   Butler v. Mayor, etc. 7 N. Y., 1 Hill, 489;
   Auriol v. Smith, 1 Turn. & R. 121, 12 Eng. Ch. 119, 37 Reprint 1041.
3. Republic of Colombia v. Cauca Co., 190 U. S. 524, 23 SCT. 704, 47 L. ed. 1159.
4. Lazell v. Houghton, 32 Vt. 579.
5. Noyes v. McLaflin, 62 Ill. 474.
6. McCausland v. Tower, 14 N. B. 125;
   Moshier v. Shear, 102 Ill. 169, 40 Am. R. 573.
7. Lattin v. Gamble, 154 Mich. 177, 117 NW. 575.

procedure and parties submit in accordance with such rules, there must be strict compliance therewith, else the award will be rendered void.[8]

However, if a party to a submission having notice of any irregularity in the procedure of arbitrators, or knowledge of the interest of an arbitrator, or his relationship with a party, or of any other deficiency, fails and neglects to protest against such condition at the time and proceeds with and participates in the hearing without formal revocation he will be estopped from pleading such irregularity.

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8. Blakeley Oil etc. Co. v. Procter & Gamble Co. 134 Ga. 139, 67 SE. 389.

Statutory Arbitration

§47. **In General**—Usually, the statutes in the various states are declaratory of what the common law is and they do not abrogate the common law on the subject.[8] Submission to common law arbitration is permissible in jurisdictions having a statutory method provided, but a common law award will not be considered as a statutory award and judgment entered therein as provided by statute.[9]

§48. **What May be Submitted Under Statute**—Statutes generally provide for the submission of any controversy which might be the subject of a civil action, except a question of title to real property in fee or for life. This qualification does not include questions relating merely to the partition or boundaries of real property.

§49. **Who May Submit**—Any person capable of contracting may submit a dispute to arbitration, and there are the same limitations under the statute as are set forth in §8, ante.

§50. **Submission in Writing**—Statutes generally provide that submissions shall be in writing.[10]

§51. **When Submission Entered as an Order of Court**—When stipulated in the submission that it be entered as an order of court, there must be strict compliance with every requirement of the statute, since the courts take jurisdiction of the subject matter only by virtue of the statute.[1] It will thus be seen that the submission entered as an order of court is wholly jurisdictional. If the statute provides the particular court in which the submission must be filed, another jurisdiction will be without power to act thereunder.[2]

§52. **Arbitrators Named in Submission**—The general rule is that arbitrators must be named in the submission,[3] but this rule is varied when the submission runs generally to a designated committee of a named organization when such organization is empowered by its charter to conduct arbitrations by a regularly appointed committee.[4]

§53. **No Power of Substitution**—Unless the submission itself stipulates that substitution may be made by remaining arbitrators in

8. Solinas v. Stillman, 66 Fed. 677; Hartford F. Ins. Co. v. Bonner Merc. Co., 44 Fed. 151, 11 LRA 623.
9. Kneiss v. Hotaling, 96 Cal. 617, 31 P. 740.
10. Boots v. Canine, 94 Ind. 408.
1. Pieratt v. Kennedy, 43 Cal., 393; Ryan v. Daugherty, 30 Cal. 218.
2. Morgan v. Smith, 33 Kan. 438, 6 P. 569.
3. Kneiss v. Hotaling, 96 Cal. 617, 31 P. 740; In re Joshua Hendy Mach. Works, 9 Cal. A. 610-11, 99 P. 1110.
4. Blakeley Oil etc. v. Procter & Gamble, 134 Ga. 139, 67 SE. 389.

the event of the death, incapacity or inability of an arbitrator to act, arbitrators have no power of substitution.[5] If substitution is allowed by the submission, the substitution must be filed with the court having jurisdiction, the same as if the substitute were an original appointee.

§54. **Umpire**—In several jurisdictions, arbitrators, acting under the statute, have no power to select an umpire.[6]

X. PROCEDURE

§55. **Arbitrators Must be Sworn**—The general rule is that arbitrators acting under statute must be sworn before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matters in controversy, and to make a just award according to their understanding.[7]

§56. **Arbitrators Must Meet Together**—All the arbitrators must meet and act together during the inquiry or investigation, but when met a majority may determine any question.[8]

§57. **Notice of Time and Place of Hearing**—Arbitrators must give notice of the time and place of hearing to both parties, for it will be fatal to the validity of an award if only one party have notice and the opportunity to be heard.[9]

§58. **Arbitrators Must Hear the Evidence**—Under the statute, as at common law, arbitrators must hear all of the evidence offered by both parties, and such evidence must be taken in the presence of both parties. Arbitrators may not receive ex parte statements from either party.

§59. **May Adjourn Hearing**—Arbitrators may adjourn the hearing from day to day and from time to time, and they must give notice to the parties of the time and place of the next meeting.[10]

§60. **Powers of Arbitrators**—Under many statutes, arbitrators have the power to swear witnesses and to issue subpoenas *duces tecum*. In other jurisdictions, the court issues subpoenas at the request of the arbitrators.

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5. Elberton Hardware Co. v. Hawes, 122 Ga. 858, 50 SE. 964.
6. McMahan v. Spinning, 51 Ind. 187.
7. Warren v. Tinsley, 53 Fed. 689, 3 CCA. 613.
8. Cumberland v. North Yarmouth, 4 Me. 459; Haven v. Winnisimmet Co. 11 Allen (Mass.) 377, 87 Am. D. 723.
9. Blodgett v. Prince, 109 Mass. 44.
10. Frey v. Vanlear, 1 Serg. & R. (Pa.) 435.

Arbitrators have no power to vary the terms of the submission, nor to make rules at variance with the statute.[1] Nor may they enlarge upon the time fixed in the submission for making the award. Their duty is to act within the time limit, and in many jurisdictions the court may compel arbitrators to make an award.[2]

XI. AWARD.

§61. **Must be in Writing**—The general rule is that awards made under the statute must be in writing.

§62. **Certainty of Award**—An award must be certain and final as to its terms, and within the scope of the submission.

§63. **Entry of Award as Judgment of Court**—It has been stated that when a submission presumes to be under the statute, there must be strict compliance therewith.[3] As for example, when under the California code, when the submission is made an order of the court, the award must be filed with the clerk, and a note thereof made in his register. After the expiration of five days from the filing of the award, upon the application of a party, and on his filing an affidavit, showing that notice of filing the award has been served on the adverse party or his attorney, at least four days prior to such application, and that no order staying the entry of judgment has been served, the award must be entered by the clerk in the judgment book, and thereupon has the effect of a judgment.[4]

§64. **Causes for Vacating Award**—The court, on motion, may vacate the award upon either of the following grounds, and may order a new hearing before the same arbitrators or not, in its discretion:

(1) That it was procured by corruption or fraud;

(2) That the arbitrators were guilty of misconduct, or committed gross error in refusing, on cause shown, to postpone the hearing, or in refusing to hear pertinent evidence, or otherwise acted improperly, in a manner by which the rights of the party were prejudiced;

(3) That the arbitrators exceeded their powers in making their award; or that they refused, or improperly omitted, to consider a part of the matter submitted; or that the award is indefinite, or cannot be performed.

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1. Morse on Arb. and Award, P. 177.
2. Johnson v. Crawford, 212 Pa. 502, 61 A. 1103.
3. Kettleman v. Treadway, 65 Cal. 505, 4 P. 506.
4. In re. Kneiss, 96 Cal. 617, 31 P. 740.

§65. **Court May Modify or Correct Award**—The court may, on motion, modify or correct the award, where it appears:

(1) That there was a miscalculation in figures upon which it was made, or that there is a mistake in the description of some person or property therein;

(2) When a part of the award is upon matters not submitted, which part can be separated from other parts, and does not affect the decision on the matters submitted;

(3) When the award, though imperfect in form, could have been amended if it had been a verdict, or the imperfection disregarded.

§66. **Decision Subject to Appeal**—The decision upon motion is subject to appeal in the same manner as an order which is subject to appeal in a civil action; but the judgment entered before a motion made cannot be subject to appeal.

Reports of Commercial Arbitrations

Scope—In presenting the Reports of Commercial Arbitrations in the following pages, the authors desire to emphasize that the arbitraments are not decisions of courts, but are the decisions and awards of committees of various trade and commercial bodies and in the main come under the classification of common-law awards.

In compiling the reports care has been exercised to give, so far as possible, the facts surrounding each individual matter, in order that the reader may inform himself of the especial points under submission, synopses of the arguments thereon and the view taken of the whole by the various arbitrators. To accomplish this it has been necessary to resort to the original documents in many cases, as the findings and awards themselves were not sufficiently explanatory of the submissions.

The reader will note that arbitrators frequently have interpreted trade rules and trade customs and have been at pains to explain the purpose and meaning of certain clauses in contracts, thereby determining authoritatively trade custom as regards the particular issue involved. This, in itself, makes this work distinctive and dependable. In any event, these precedents unquestionably will prove of value to the merchant facing situations similar to those adjudicated by commercial bodies.

Insofar as possible the arbitrations have been classified under different headings in order that each subject may be followed to its conclusion. However, the very wide range of subjects treated has not made this feasible in every instance, for at times more than one issue was involved in a single submission. Therefore, as a further aid to those using the volume, head-notes have been provided and proper cross-notes inserted for ready reference. For example, under the heading "Rejection" will be found many head-notes epitomizing each individual matter involving a rejection on account of non-compliance with some contract provision, as the time of shipment clause. Thus the reader may easily follow the head-notes and refer to the page upon which is given the arbitration deciding the particular issue.

Many hundreds of arbitrations involving solely questions of quality, that is to say, whether goods were of the grade and description specified in contracts, have been examined, but these have not been touched upon for the obvious reason that they would prove of little or no value. Enlightened merchants in all lines of business usually leave to persons more or less expert in their respective lines the determination of grades, values and comparisons with standards established for commodities, and abide by the opinions of such experts. It is unqualifiedly true that

without this intelligent method of determining grades and of evaluation, business in many lines virtually would be at a standstill.

In presenting the Reports, the authors have refrained from comment thereon, as in their opinion this would serve no good purpose, but on the contrary might be provocative of controversy. In rare instances there will be noted seeming conflict between arbitrators' decisions on similar issues, but instead of implying error in any one case the authors believe it better to assume that the issue was decided equitably by the arbitrators in each individual case. Impartial, disinterested arbitrators are in position better to judge the merits of a matter than is a commentator viewing it from a distance.

Therefore, the Reports are commended to the earnest consideration of the business and professional reader for the intrinsic good that is in them.

Agency

Responsibility of Seller When He Voluntarily Becomes Buyer's Agent in Delivering Goods Sold to Third Party—Term F. O. B. Named Plant—Reimbursement for Loss of Profit Not Allowed—A, a California packer sold to B, a New York merchant, a carload of **Prunes** F. O. B. cars San Jose, California, November delivery. B resold to C. B requested A to act as his agent in effecting delivery to C for B's account, and gave instructions to A to ship the goods to a Santa Clara plant for inspection. A refused to ship from his plant until after acceptance, as the contract called for F. O. B. San Jose plant. Thereupon B wired A on November 24th as follows:

> *Ship car as per instructions. Waive right of inspection at packing house. Have bought this car on regular terms. Simply asking you make delivery as you would do for yourself. Assume all responsibility.*

A replied to this message on November 24th as follows:

> *Will ship car as requested, but if this procedure causes any delay which interferes with replacement or making new tender this month in case of rejection, disclaim any responsibility as should have ample time arrange replacement on stipulated sales terms of acceptance.*

B also authorized A to make collection of the invoice from C and remit the difference between the price to be paid by B to A and the price at which C had purchased from B, retaining the original cost of the goods. In carrying out the instructions, A made shipment to Santa Clara, and upon inspection November 30th C rejected a portion of the shipment and accepted and paid for a portion. Thereupon B made claim on A for loss of profit on the resale in the sum of $1,649.99, alleging that A had not shipped goods of contract grade.

C called for arbitration with B, and received an award granting him an allowance of two cents a pound on the rejected portion of the shipment.

A and B then submitted the following question to arbitrators:

> *Did A fulfill his obligation with B on sale originally confirmed November 22, 1920, and if not, should A reimburse B for loss of profit sustained by B through A's failure to fulfill such obligation?*

Held, That the sale was F. O. B. plant San Jose, and A made shipment in accordance with the contract of sale, and profits not being a part of the contract, B's claim for loss of profit is disallowed, with costs to B. (Dried Fruit Association Arbitration No. 10, 1921).

Damages for Breach of Agency—A entered into an agency contract with B, engaged in business at Halifax, Nova Scotia, in May, 1910. By the terms of the agency, B was to be protected in his territory on certain brands, labels and cartons. On June 1st of that year, B forwarded an order for a large quantity of **Prunes** and assorted **Raisins.** In his communication B stated that he would leave the filling of his order to the good judgment of A, who was a packer and therefore in a position better to judge the condition of the market. The letter above referred to, contained this sentence:

> "We will never hold you to any quoted figures, knowing you will always do your best for us, and knowing how uncertain the market is."

A never acknowledged this communication, and under date of June 23, 1910, B sent a copy thereof, expressing the opinion that it never had been received. On July 6, 1910, A wrote B stating that the order had not been booked. This communication was received by B on July 16, 1910. Meanwhile, the goods had been sold to other Nova Scotia buyers under the specific brands embraced in the agency contract. In the end B was forced to accept and pay for goods at A's then price, which was considerably higher than that prevailing at the time the original order was forwarded. B demanded reimbursement for the excess paid and A contested the claim, alleging that no sale had been made.

Held, That the letter of B can be construed in no other sense than an order, and B had a right to assume that his order had been booked. Although no telegraphic confirmation was sent, neither was the order declined. By the sale of specific brands to other concerns, B was at the mercy of A. All of B's communications show earnest, though unbusinesslike, methods on his part and the course of A also is criticised. B is entitled to recover from A the difference in the market price at the time order was received and the price on the date A finally filled the order. (Dried Fruit Association of California Arbitration No. 3, 1910).

Broker

The general rule is that the principal is responsible for the acts or omissions of his broker, within the scope of the broker's authority.

Failure of a broker to transmit all of the conditions of a sale, such as a requirement of *immediate* shipment, will not excuse the principal in failing to make *immediate* shipment, and responsibility for such an omission rests entirely upon the principal for whom the broker acted (California Bean Dealers Association Arbitration No. 19, 1918, Page 33)

Notice to Seller's broker of inability to effect shipment within contract period is not notice to Buyer, and Seller will not be excused from fulfilling his contract covering **Raisins** because of such insufficient notice. (Dried Fruit Association of California Arbitration No. 128, 1918, Page 33).

Principal Responsible for Broker's Omission—A purchased a carload of **Beans** through a broker, memorandum of sale specifying *immediate* shipment. The broker, in confirming the sale to B, his principal, failed to advise that the car was to be shipped *immediate*, and B drew on Buyer with warehouse receipt attached under the belief that the sale was ex warehouse, but the draft was refused by Buyer, who took the position that *immediate* shipping period having elapsed, he was not obligated to take delivery whatsoever and he therefore gave notice of cancellation of the contract.

Held, That from all the facts and from the evidence taken it appears that the broker failed to notify his principal of the actual conditions of the sale, and as the principal is responsible for the acts of the broker, within the scope of his authority, and as the Buyer acted in evident good faith, he cannot be made to suffer for mistakes or omissions of the Seller's broker. Therefore, rejection by Buyer was justified, and Seller had no right of another tender after the expiration of the shipping period, in this instance *immediate* shipment, (California Bean Dealers Association Arbitration No. 19, 1918).

Notice to Broker Not Notice to Buyer—A sold to B a quantity of **Raisins** for October-November shipment. Shipment was not made in either month or subsequently. Upon submission to arbitration, A claimed that, having notified his broker of the delay in shipment, he was entitled to an extension of time due to contingencies arising as a result of the war. B contended that A's notice to A's broker could not be construed as notice to B and that he was entitled to reimbursement for non-delivery.

Held, That, in view of war conditions which obtained, A was entitled to an extension of time beyond the last shipping period, namely November 30th, provided proper notice of inability to ship had been given to B. No such notice having been given, we cannot accept A's position that a telegram sent to his agent in New York and having no reference to B's unfilled contract was notice to B. In view of outstanding promises that shipment would be made the failure to give proper notice prior to the expiry date of the shipping period was a fatal omission. (Dried Fruit Association of California Arbitration No. 128, 1918).

Offer of Sale Subject to "Prompt" Answer Not Consummated by One Principal Accepting Through Broker by "Night Letter" Although Reply Was Sent in Less Than Two Hours from Receipt of Offer—A San Francisco merchant gave a Broker a firm price on 800 bags California Japan **Rice** for submission to a named prospective purchaser at Los Angeles, the offer being subject to *prompt reply.* The Broker sent the offer to the Los Angeles prospect by *fast* message, requesting a rush answer accepting the same. The offering telegram was received by the Los Angeles house at 3:07 p. m. on January 27th and at 4 p. m. of the same date the Los Angeles house replied, by *night letter*, accepting the offer. On January 28th the Broker transmitted the acceptance to the Seller, who refused to confirm the business on the ground that *prompt* reply had not been made, and also that he was not aware that the offer was intended for any specific prospective purchaser at Los Angeles. The Broker insisted that the identity of the Los Angeles principal had been revealed at the time he received the offer.

Held, That the quotation given the Broker was meant for this specific Buyer, and the Broker was within his rights in assuming that the quotation was firm subject to a *prompt* reply, which reply, according to the evidence, was given by the Los Angeles principal within less than two hours after receipt of the message and the business should have been confirmed by the Seller. (Rice Association of California Arbitration No. 8, 1921).

Award Reversed on Appeal—The Seller appealed from the foregoing award, on the ground that the arbitrators had erred in holding that a *night letter* complied with the requirement of *prompt reply* to a firm offer of sale. The Arbitrators on Appeal said:

"That the offer by Seller having been given to the Broker for transmission to a specific prospective Buyer and the Buyer being named, shall be considered as a firm offer for a *prompt* acceptance. The evidence showed that the Broker telegraphed the offer to his principal in Los

Angeles by day letter that same day and requested him to *rush answer accepting Seller's lot.* Buyer, who received this telegram about 3:07 p. m. that day, January 27th, replied by wire about 4 p. m. January 27th, authorizing the Broker to purchase the 800 bags in question, but instead of rushing reply by *fast* message he sent it by *night letter* and he should have known that the result would be that the reply could not be received by the Broker until the following morning; in fact the confirmation copy of the telegraphic reply was received by the Broker by mail that same morning, shortly after the night letter arrived.

"The (original) Arbitration Committee in its decision states: 'Therefore, the Broker was within his rights in assuming that this quotation was firm subject to a *prompt reply,* which reply, as per evidence, was given by Buyer, Los Angeles, within less than two hours after receipt of the message and the business should have been confirmed by Seller.'

"As stated above, we agree with the Arbitration Committee that 'This quotation was firm subject to a *prompt* reply,' but the reply was by *night letter* instead of a *fast* telegram or even a *day letter,* and we decide this cannot be considered a *prompt* reply to an offer made under the circumstances in this case.

"The offer was made in the morning of January 27th to be wired to a Los Angeles Buyer and we feel that a *prompt* reply means a reply by *fast* message, which should have been sent by Buyer so there would be an assurance that his Broker would receive it and be able to close the transaction that same day.

"We do not feel that the Broker was at fault in this transaction. He promptly wired the offer and asked his principal to *rush answer.* A night letter, which could not possibly reach the Broker until the following day, cannot be considered as a *rush answer* when no option until the following day was given. Had Broker's principal in Los Angeles promptly protected him by a *rush answer* as requested by him, the acceptance would have constituted a contract.

"We reverse the decision of the Arbitration Committee and decide that Seller is not obligated to confirm and fill the order as submitted by Broker." (San Francisco Chamber of Commerce Arbitration on Appeal from the Rice Association of California, 1921).

Buyer's Inspection and Acceptance

The term "Subject to Buyer's inspection and acceptance" in a contract has been variously interpreted, but the majority opinion is that it is virtually an option on the goods and Buyer is the sole judge of quality of goods under such a contract. (Foreign Commerce Association Arbitration No. 26, 1920, Page 37).

In a dissenting opinion, one Arbitrator held that phrases similar to that under discussion customarily are considered to give Buyer the right to satisfy himself that goods tendered are of contract quality, and not simply to give an option on the goods until after Buyer had inspected them. (Foreign Commerce Association Arbitration No. 26, Dissenting Opinion, Page 38).

Where a contract covering **Dried Fruit** specifies *subject to inspection at point of shipment,* the Buyer has the right to refuse the shipment if, for any reason, it is not satisfactory to him. (Dried Fruit Arbitration No. 172, 1914, Page 39).

Such Clause Becomes Conditional Sale—A sold B a quantity of **Walnut Meats,** subject to "Buyer's immediate inspection and acceptance." Buyer inspected the merchandise, and notified Seller that he could not accept same. Seller refused to accept the rejection, claiming that the goods were as designated and Buyer was obligated to take delivery.

Held, That the clause *Subject to Buyer's immediate inspection and acceptance* makes the agreement a conditional agreement and the acceptance of the merchandise, after inspection, is a condition precedent to the consummation of the purchase; hence, prior to acceptance by Buyer, said agreement merely constitutes an option in favor of Buyer to be exercised by him immediately. The whole agreement rests upon and is subject to Buyer's immediate inspection and acceptance. No one is authorized to accept for Buyer as the purchase is made subject to Buyer's acceptance after inspection; therefore, Buyer is the sole judge of whether the merchandise will meet his requirements. This being the case, this agreement merely constitutes an option in favor of Buyer to be exercised by him immediately. No more explicit and unmistakable language than that employed in the clause "Subject to buyer's immediate inspection and acceptance," which gives the Buyer the sole right to determine for himself whether the merchandise was satisfactory to him, could be employed; and this language must be given full force and effect in any fair adjudication of the difference between the parties in the premises. That Buyer, in refusing to accept

the merchandise as he did, was entirely within his rights as set forth in the preceding paragraph. (Foreign Commerce Association Arbitration No. 26, 1920).

While the award was signed by a majority of the Arbitrators, and therefore binding upon the parties, the following dissenting opinion was rendered by one of the Arbitrators:

Dissenting Opinion—"The undersigned arbitrator does not agree with his associates in the foregoing opinion and bases his dissension upon the following statement of facts and his conclusion therefrom:

Seller put Buyer on notice that the lot of meats contained twenty cases of amber quarters and Seller's refusal to give an inspection order until Buyer would first sign a memorandum of purchase of the lot including the ambers should have caused Buyer, if he was in any doubt as to whether he was closing a contract or taking an option, to have amended the clause in contract regarding inspection to read *subject to Buyer's confirmation after inspection* or some similar phrase. Buyer has failed to clearly express in contract his intention that under the clause *subject to Buyer's immediate inspection and acceptance,* he was merely taking an option on the goods; on the other hand Seller made it very plain, by insisting that quality be properly described and all other details of sale covered in signing memorandum of sale, that he considered the deal closed provided goods were found to be in accordance therewith. Had Seller only meant to give an option subject to Buyer's approval of quality he would not have cared particularly about the language of the clause describing the quality of the meats, nor would the Buyer's signature have been necessary or demanded.

"Phrases similar to that inserted in this contract, i. e. *Subject to Buyer's immediate inspection and acceptance* customarily are construed to give Buyer the right to satisfy himself that goods tendered are of contract quality, and not simply to give an option on the goods until after Buyer has inspected them; if confirmations of sale similarly worded are to be held as mere options, the integrity of trade relations will be seriously impaired and the important element of good faith in buying and selling transactions undermined to the serious injury of reputable concerns.

"Commercially, Buyer practically fulfilled that part of the clause calling for his "*acceptance* "when, by signing the contract, he "*accepted*" all of its terms and conditions, including the description of the quality of the meats, and thereafter the only remaining matter to be determined was whether the meats were of the described quality.

"I feel that Buyer's rejection was not justified and that he should take delivery of the meats and pay for same in accordance with broker's

memorandum of sale, plus carrying charges." (Foreign Commerce Association Arbitration No. 26, 1920).

Under Term "Subject to Inspection" Buyer Has Absolute Right of Rejection—Privilege Not Limited—Importance of Obtaining Signed Contract—A sold to B a quantity of **Dried Fruit** under the Uniform Dried Fruit contract, containing the following qualifying clause: *Subject to inspection at point of shipment.*

Buyer made the inspection and rejected the goods. Seller claimed that by reason of Buyer's rejection he sustained a loss because the goods were resold at a price lower than that provided in the contract, and demanded reimbursement for the loss.

Held, That the clause *subject to inspection at point of shipment* gave Buyer the right to refuse the shipment if for any reason it was not satisfactory to him, as the privilege of inspection is not limited in any way. If the clause had read *subject to inspection as to quality* or *subject to approval of quality,* then the question of quality would have been one of arbitration; but as the contract simply calls for goods subject to Buyer's inspection, and Buyer declined to accept after inspection, we do not see how he can be held for the loss sustained by the Seller. A sale with this qualification is simply an option—nothing more—and in refusing to accept Buyer is within his rights. Had this sale been made without this clause, or *subject to approval of quality,* Buyer would have been obliged, under the "separable lot" clause of the contract, to have taken all of the goods at the contract price other than a portion which Buyer claimed to have been faced, and these would have been subject to arbitration on samples and if found to be improperly faced, proper damages would be assessed by the arbitrators. We call Seller's attention to the fact that while he signed a contract and forwarded same to Buyer he did not secure a signed contract in return from Buyer, and while in this case it is immaterial, the matter having been mutually submitted for arbitration, a contract should be insisted upon at all times; otherwise it might, in the opinion of arbitrators, become an important factor in the presentation of any case. (Dried Fruit Association of California Arbitration No. 172, 1914).

Certificate of Quality

Under contracts calling for certificate of quality to be final, inspection and certificate of Chamber of Commerce at Port of Entry, showing goods to be F. A. Q. of the season or of the grade described invariably will be upheld, unless error of inspection be clearly shown.

Any unauthorized alteration of a certificate of quality will not be countenanced by arbitrators. (Foreign Commerce Association Arbitration No. 25, 1920, Page 52).

Where contract calls for certificate of quality by Chamber of Commerce at Port of Entry a certificate issued by any other commercial organization is not a good tender. (Foreign Commerce Association Arbitration No. 25, 1920, Page 52).

Where a contract specifies "Chamber of Commerce certificate final", the assertion of Buyer, who seeks to reject, that the goods tendered had not been properly segregated at time of official inspection, will not avail in the face of the certificate itself. (Foreign Commerce Association Arbitration No. 26, 1920, Page 50).

Nor will the statement of the Chief Inspector of the San Francisco Chamber of Commerce that there had been no segregation as to 2,000 bags of beans ex a lot of 6,000 bags at the time of inspection invalidate the certificate itself. (Foreign Commerce Association Arbitration No. 26, 1920, on Review, Page 50).

Under a C. I. F. contract covering **Prunes,** certificate of inspection of the goods issued at time of shipment is final under the so-called Water Contract of the Dried Fruit Association of California and a certificate of inspection made by private inspectors at destination will not avail before arbitrators. (Dried Fruit Association Arbitration No. 1, 1921, Page 47).

A certificate of inspection covering **Beans** sold under the so-called Water Contract (1919) of the California Bean Dealers Association must be made at the point of *shipment,* i. e. the dock at San Francisco, and not at an interior rail shipment point. (California Bean Dealers Association Arbitration No. 26, 1922, Page 45).

When a contract specifies *certificate of quality final,* and the parties mutually waive the finality of certificate, arbitrators will go beyond the certificate itself and pass upon the quality of **Beans.** (Foreign Commerce Association Arbitration No. 26, 1920, Page 42, and Arbitration No. 34, 1921, Page 43).

Where the original importer stands upon the contract stipulation *certificate of quality final* arbitrators will not go beyond the certificate in determining the quality, notwithstanding that other parties have waived the stipulation as to the certificate in other arbitrations involving the same lot of **Beans.** (Foreign Commerce Association No. 40, 1921, Page 44).

When a contract covering **Rice** is C. I. F. in terms, and foreign certificate of quality shows that the rice was in sound condition at time of shipment and F. A. Q. of the season, Buyer will not be sustained in maintaining that it must have been in unsound condition at time of shipment in face of the certificate of inspection. (San Francisco Chamber of Commerce Arbitration, 1915, Page 70).

Where Parties Waive Finality of Certificate, Arbitrators Will Consider Quality—Where Sales Are Interrelated and Third Party Involved—Seller, in Certain Circumstances, May Become Agent of Buyer—His Inspection and Acceptance—A, a merchant of Chicago, purchased from B, a San Francisco importer, 2,000 bags of **Chutenashi Beans,** ex dock Seattle, certificate of Seattle Chamber of Commerce and Commercial Club final as to quality. A, in turn, sold 1,400 bags of Chutenashi Beans to C, a merchant of San Francisco, and C had sold 1,400 bags of the same merchandise back to A. The contracts between A and C were identical with that between A and B.

When the beans arrived at Seattle B notified A, who instructed B to advise C. C gave A shipping instructions to ship 1,400 bags to A in Chicago, and instructed the remainder to go to another buyer. C called for an inspection certificate on the beans and was furnished with such a document, grading the beans as C. H. P. Chutenashi Beans, Crop of 1920, F. A. Q. of the season. C also procured a sample of the beans at Seattle. The beans were shipped by B, as an accommodation to C, to A at Chicago. When the beans arrived at Chicago, A sought to reject them on the ground that there was an admixture of Kotenashi beans with the Chutenashi beans, and he sought to hold C responsible. C contended that the transactions were interrelated and that if the beans were not according to contract, A had a claim against B and none against C, since the identical lot was tendered to C by B, acting under instructions from A. However, C consented to drawing of samples at Chicago for arbitration at San Francisco, and this was done.

The arbitrators felt called upon to decide one question only, namely: *Was the delivery of 1,400 bags Chutenashi beans to A by C a good delivery under the contract?*

In this connection the arbitrators said:

"Notwithstanding the provision of the contract calling for Chamber of Commerce certificate final as to quality, the arbitrators are of the unanimous opinion that they are not confined to a technical consideration of this certificate if the samples submitted for arbitration indicate that there was any error in the shipment which would affect the true character of the delivery, and therefore in all equity they made a careful examination of the samples submitted. The arbitrators found on examination of the samples that a small percentage of the shipment consists of Kotenashi beans *contained in separate bags* and not mixed with the Chutenashi beans. In the opinion of the arbitrators Kotenashi beans were loaded into the car in error but the error was not due to the gross carelessness of the Seller, who in good faith gave loading instructions of a specific lot of Chutenashi beans with certain marks."

The arbitrators, having found that there were certain bags of Kotenashi beans in the shipment, directed A to have the beans segregated, and awarded that he return the number of bags of Kotenashi beans to C, and directed C to repay A for same, together with charges of segregation. This was done in due course, and it was found that there were 71 bags of Kotenashi beans in the shipment. The amount claimed by A against C was $524.16, representing the price paid for the beans and the costs of segregation and carrying charges. (Foreign Commerce Association Arbitration No. 26, 1920).

Claim Arising from Same Delivery, Except That Buyer Was the Seller—Following Arbitration No. 26, C demanded an arbitration with A, claiming the identical sum from A for the same reasons advanced by A in prosecuting his claim against C.

The arbitrators said:

"Both contracts of re-sale show clearly that the transactions are re-sales of an original lot to be imported by B, and the transactions are therefore more or less interdependent, one delivery being predicated upon another. There has *not* been sufficient evidence produced to show that C did examine the entire 1,400 bags, nor proof that he had any knowledge that any portion thereof were a different variety of beans, namely Kotenashi. It is not customary when inspecting and sampling beans to examine every bag, and the arbitrators, from the facts submitted, believe that the Kotenashis were loaded on to the

cars without the knowledge of C after inspection, either by a misdelivery on the part of the dock at Seattle, or, if the marks on the bags of Kotenashis were identical with the marks on the bags of the Chutenashis, they were incorrectly bagged by B's supplier in the Orient. No evidence was submitted as to the marks on the bags.

"Notwithstanding the provision of the contract calling for Chamber of Commerce certificate being final as to quality, there is proof of error in shipment affecting the true character of the delivery, and arbitrators feel that they are, therefore, not confined to a technical consideration of the coast inspection. It is not a question of a slight variation in quality of a given variety of beans, but of a palpable error in forwarding the wrong kind of beans.

"Arbitrators are of the opinion that an error having been made in the shipment, the only way in which C can recover is to look to his suppliers A, C having no contractual connection with B in this transaction."

The arbitrators then awarded C $524.16 to be paid by A, the identical sum awarded in Arbitration No. 26 (reported in the foregoing) against C. (Foreign Commerce Association Arbitration 34, 1921).

Original Buyer Seeking Redress from Oriental Supplier—Where Certificate as to Quality Final—Inspection by Agent, Himself a Buyer—A then sought to recover the sum of $524.16 from B, the original supplier. A submitted the two previous arbitrations, Foreign Commerce Association Arbitrations Nos. 26 and 34, respectively, in evidence, claiming his damage thereunder.

The arbitrators said:

"The beans were sold by B to A under a contract providing for Chamber of Commerce certificate to be final. Such certificate was furnished by the Seller to the Buyer. In the arbitration dated December 21, 1920, between A and B, the parties thereto agreed to submit the question of quality and did accept samples drawn by public sampler at Chicago, upon which the arbitration was to be based. Thereby they waived the provision in the contract providing for Chamber of Commerce certificate to be final.

"In the present case, however, the Seller at no time has waived his rights under the contract, and in the opinion of the arbitrators they cannot go beyond the express limitations of the written contract. The arbitrations between A and C relate to the sale and resale of the identical lot of beans. When A was asked for shipping instructions by B, under the terms of another contract, A instructed delivery to C. C, according to the record, not only received a Chamber of Commerce certificate at Seattle from B, but also was afforded the opportunity to

and did examine the goods prior to shipment. The goods were then shipped, at the request of C, to A by B, who acted as an accommodation to C.

"After the most careful consideration of the entire record the arbitrators are of the unanimous opinion that B, having obtained the disinterested certificate of the Seattle Chamber of Commerce, and having given C, acting as agent for A, the opportunity to inspect the goods, and C having so inspected, B fully complied with every feature of this contract.

"In the unanimous opinion of the arbitrators A cannot now claim an allowance or reimbursement from B for the acts of his agent, namely: C, who inspected and accepted the goods at Seattle. This was an F. O. B. cars, Pacific Coast, sale and was not delivered at Chicago. Every document submitted by B classifies these beans as Chutenashi beans, and the sale having been predicated upon a Chamber of Commerce certificate as to quality, the arbitrators are in duty bound not to go beyond such certificate unless there be a clear showing of fraud or collusion in the shipment of these beans.

"The arbitrators realize that in making this decision they are seemingly taking a different attitude than that taken by other arbitrators in this Association in the matters submitted between A and C. But there is this essential difference between this arbitration and the others, namely: C and A impliedly waived the finality of the Chamber of Commerce certificate when they submitted the question of quality to the arbitrators, and the arbitrators in the other cases were bound to make an award within the terms of the submission."

Held, That the claim of A against B is disallowed with costs to A. (Foreign Commerce Association Arbitration No. 40, 1921).

Sufficiency of Inspection Certificate on Beans Sold Under Water Shipment Contract—Inspection at Interior Point Does Not Cover Goods at Time of Shipment—Deterioration in Transit —A California shipper sold a car of California Mexican Red **Beans** to a New York merchant, F. O. B. dock, San Francisco, for shipment by steamer, under the Uniform California Bean Contract for water shipment (1919).

The beans arrived at New York ex S. S. "Edgar Luckenbach" on December 2, 1921, and Buyer, who had already paid for them, immediately rejected on the ground that the beans were infested with live weevil. Samples were drawn and sent to the California Bean Dealers' Association, at San Francisco, for the purpose of arbitration.

The Seller claimed that the car had been shipped from Turlock October 29, 1921, in S. P. Car No. 89325, and that the identical car load was delivered to the vessel and bill of lading issued therefor on November 4, 1921. The Seller maintained that the car had been officially inspected and a certificate thereon issued by the Chief Inspector, Grain Trade Association of the San Francisco Chamber of Commerce, and produced Certificate No. 45836, showing that the identical lot shipped per the S. S. "Edgar Luckenbach" was sampled at Turlock and graded as Choice Recleaned, Crop of 1921, "in sound condition at date of inspection—October 29, 1921." The Seller, however, had not sent this certificate to the Buyer with other documents, and it was not until after the goods arrived at New York and the Buyer had taken exception to the quality that the Seller forwarded the certificate.

The Uniform California Bean Contract for Water and Rail-water Shipment (1919) contains this clause:

> Buyer hereby expressly assumes all risks after examination and acceptance by Buyer's representative at point of shipment and furnishing by Seller of Public Weigher's Certificate. Failure on Buyer's part to so inspect will give Seller privilege to have inspection made by Inspector of the Chamber of Commerce of San Francisco, Los Angeles, or San Diego, and his certificate of quality issued therefor shall be final as to quality. If inspection as above provided for is not made, any dispute as to quality shall be settled by arbitration as hereinafter provided.

The arbitrators said:

"Under this clause, upon failure of Buyer to have the beans inspected, the Seller had the privilege of having *inspection made by Inspector of the Chamber of Commerce of San Francisco * * * * and his certificate of quality issued therefor shall be final as to quality. If inspection as above provided for is not made, any dispute as to quality shall be settled by arbitration.*

"The goods under contract were sold 'F. O. B. dock for Steamer' and not F. O. B. Cars Common Shipping Point. Therefore, the point of inspection under the contract was *on the Dock at San Francisco* and not on the car at Turlock. Having failed to have inspection made on the dock at San Francisco, Seller did not comply with the inspection clause in the contract. Therefore, the inspection certificate covering the beans on the car at Turlock is not a valid certificate covering beans on the dock at San Francisco. The language of the contract is explicit

and its intent cannot be mistaken. Furthermore, trade custom, long since established, requires inspections for water shipments to be made on the dock, even though reinspection is necessary. Had the certificate under discussion covered the beans on the dock at San Francisco the contract would have been complied with by the Seller as to quality, and the Buyer would not be entitled to arbitration as to quality, but the certificate would be final.

"Since the inspection was not made by the San Francisco Chamber of Commerce on the dock, as provided by the contract, the arbitrators decide that the Seller failed to comply with the inspection clause of the contract, and that the Buyer is entitled to a determination and award on the question of quality.

"The Buyer, in his submission to arbitration, insists that weevil could not and would not develop in new crop beans within the time the beans were en route to New York, namely 26 days, and he offered in evidence the statement of a committee of the New York Dried Fruit Association to the same effect. In this both the Buyer and the aforementioned committee are in error, for it has been established beyond peradventure of doubt that, under certain conditions, new crop beans have developed weevil in less time than 26 days, and there is no known means of determining how quickly weevil may develop in beans. The arbitrators are of the opinion that the beans which they have examined in this arbitration may have developed weevil between the time of loading and inspection at Turlock, on October 29th, and the shipment on the steamer at San Francisco, November 4th. Had the beans been reinspected on the dock at San Francisco, their exact condition at that time would have been ascertained and established."

Held, That the Seller, not having complied with the inspection clause in the contract, and the beans having arrived at destination in a weevily condition, rejection by Buyer is sustained, and Seller shall refund the purchase price together with carrying charges. (California Bean Dealers Association Arbitration No. 26, 1922).

Certificate of Quality of Dried Fruit at Time of Shipment by Water is Final—Inspection Terms of So-called Water Contract Fully Interpreted—Claim for Deterioration in Transit Disallowed—A California packer sold to a merchant in Bergen, Norway, a quantity of **Prunes,** F. O. B. California, priced C. I. F. Bergen. Shipment was made by steamer in May, 1920, and upon arrival of the goods at destination Buyer objected to the quality, claiming that as the goods did not arrive in good condition they were not sound at time

of shipment, and asked to be reimbursed for the difference between the invoice price and the appraised value at port of destination.

The contract was dated July 15, 1919, and specified goods of the season of 1919, to be shipped during December, 1919. By the terms of the contract the Buyer agreed to open a letter of credit, which was not done prior to December and not until May, 1920. The contract provided that if for any reason shipment be impossible, the credit should be available against warehouse receipt on January 1, 1920. Upon issuance of the letter of credit, the goods were shipped from the interior of California and arrived on the dock for steamer May 12, 1920, when Seller had them inspected by the Dried Fruit Association of California and a certificate issued May 21, 1920, showing the goods to be "of good quality, condition, count and of the grade and character" required by the contract. The goods were shipped per M/S "San Francisco" and were approximately three months in transit.

Buyer immediately objected to the quality, and caused two inspectors to examine same at the request of the Town Justitiarius of Bergen. These inspectors issued a certificate to the effect that 467 of 1,000 boxes were of "sound and properly handled quality," but that the remainder, 533 boxes, were not, and the inspectors made a certain appraised value on this remainder. The inspectors at Bergen also made the following comment:

> *We may add that a certificate ought not to have been issued by the American inspectors for the above 533 boxes.*

On the basis of the Bergen inspection and appraisal, the Buyer made claim for $1,638.36. The Buyer also caused samples to be drawn and sent to the Chamber of Commerce of the State of New York and by that body transmitted to the Dried Fruit Association about a year after having been drawn.

The Seller maintained that the certificate of inspection of the Dried Fruit Association is final and conclusive upon both parties. In his argument on submission the Seller stressed the finality of the certificate, as follows:

> "The contract provides 'a quality certificate of the Dried Fruit Association of California showing the goods to be in accordance with the contract' shall be furnished 'if requested by Buyer at time of sale or desired by Seller.' If, after examination, the certificate is refused, there shall be 'immediate arbitration * * * before the Dried Fruit Association at San Francisco in accordance with its rules' and 'the findings of the Arbitration Committee shall then take the

place of the inspection certificate and be of equal force and effect.' The provisions of the contract regarding the certificate of inspection are meaningless unless the certificate had finality."

The Buyer insisted that the condition of the prunes on arrival was the governing factor, and that the provision in the Uniform Dried Fruit Association's contract covering water shipments involved no obligation on the part of the purchaser to accept such certificate as final, and in fact had no force and effect.

Answering this point, the Seller said in his presentation:

> "A written contract is simply an instrument in which the parties seek to state what is agreed upon between them, and the vital question always is what they meant. Agreements which are necessarily implied from the language used are just as effective as agreements which are expressed in so many words. It was not necessary, in order to make the inspection certificate final, that the parties use a particular formula, or declare in so many words that it should be *final as to grade, quality and condition.* If the contract shows that they understood and intended that it should be final, it is as effective to that end as though they had said so in so many words.
>
> "The parties contracted in view of the trade customs and practices which had obtained for years. The inspection certificates of this Association had for years been accepted as final by the parties to export contracts, and read in the light of that trade practice, the meaning of the contract is beyond question. But even without reference to that particular practice, its meaning admits of no doubt. The certificate was, by the terms of the contract, given the same force and effect as the findings of an arbitration committee, and this can mean nothing except that the certificate when issued should be final."

Held, (1) That the samples of prunes submitted by Buyer to substantiate quality cannot be taken into consideration, as it is not possible at this late date to determine by said samples the condition or quality of Prunes when shipped from San Francisco in May, 1920, approximately two years ago. In addition to the lapse of time must be considered the unknown treatment the fruit has received, such as storage, climatic conditions, etc., while in transit and at destination; (2) that Seller furnished a certificate of quality at time of shipment, and this certificate is the only direct evidence before the arbitrators

by which to determine the quality of the prunes at time of delivery to steamship company at San Francisco. This certifies that the prunes were inspected after delivery to the steamship company by an official inspector of the Dried Fruit Association of California, and were found by him to be of the crop of 1919 and of fair average quality of the season, in good condition and of proper count. Therefore, Seller fully complied with all the terms and conditions of his contract, and the claim of Buyer is disallowed. (Dried Fruit Association Arbitration No. 1, 1922).

Where Certificate of Quality Is Final Mere Statement That Goods Were Not Segregated Will Not Suffice—A sold B a quantity of **Kotenashi Beans,** Chamber of Commerce Certificate to be final as to quality. Buyer rejected the tender, alleging that the official inspection certificate did not truly state the quality of the beans as to moisture; that the shipment covered by the contract not having been segregated from a shipment of 6,000 bags prior to inspection, the inspection certificate could only be based upon the average of the entire shipment and was not a fair determination of the particular goods; that Seller made two previous tenders of goods that were repudiated owing to the fact that the moisture content was in excess of 16 per cent; that as a result of a further determination made by the Chamber of Commerce of the segregated 2,000 bags the moisture content was found to exceed 17 per cent. On the other hand, Seller alleged that the contract provided that Chamber of Commerce certificate shall be final; that the goods were properly inspected after segregation, a clean certificate issued thereon and that in every way he complied with the contract requirements; that no previous formal tenders were made and that there was no ground for rejection, either in fact or on the face of the documentary evidence presented.

Held, That Seller did not make any preliminary formal tenders prior to the specific tender of September 1st, upon which the case rests, which tender was in full accordance with the contract and should have been accepted by the Buyer. In view of the Buyer's statement as to the irregularity of the certificate, the arbitrators have obtained a confirmation from the Chief Inspector, San Francisco Chamber of Commerce, that the particular 2,000 sacks comprising this shipment were segregated prior to inspection and the issuance of the certificate, and that the certificate was based only upon the specific goods in question. That in his letter of August 26th Seller did not indicate, as claimed by Buyer, that it would be impossible for him to deliver within the specified time. He merely asked the Buyer if an extension of time would be agreeable to him. There was nothing in this letter

that in any way justified the Buyer's covering elsewhere and if he did so, he did so at his own risk and for his own account. If the previous tenders alleged by the Buyer had been made, any criticism or contention in connection therewith was waived by his own admitted extensions and consent to additional tenders. The arbitrators do not consider that the second certificate obtained by the Buyer has any bearing on or is relevant to this issue for the reason that the original certificate covered all the contract requirements and was, therefore, final.

The arbitrators also desire to go on record as vigorously condemning the inclusion in the record by either party to an arbitration of any insinuations or assertions reflecting upon the motives actuating the other party. Such matter has no place in proceedings of this character. (Foreign Commerce Association Arbitration No. 26, 1920).

Immediately upon issuance of Finding and Award in the foregoing, Buyer, supporting his allegation with a signed statement from the Chief Inspector of the Grain Trade Association of the San Francisco Chamber of Commerce to the effect that there had been no segregation of the lot of beans marked "TYC" at the time samples were drawn and examination made as covered by Certificate No. 38888, requested a reconsideration and reversal of the decision of the arbitrators.

On this proposition, the arbitrators said:

"Careful consideration has been given the entire subject matter. The facts are that the contract called for 'Chamber of Commerce certificate final.' Seller, in good faith, tendered such document, he, as well as others, having accepted same at its face value. It was the only document available at the time and, so far as the record shows, was entirely regular and is to this day in full force and effect, never having been recalled. By tendering such document Seller fully met his contract requirements." (Foreign Commerce Association Arbitration No. 26, 1920).

The statement of the Chief Inspector contained the following:

> "The Certificate No. 38888, dated August 24th, was issued upon samples which had been taken upon arrival of steamer when several lots of the mark 'TYC' had been discharged on the dock and before any particular lot of 2,000 bags had been segregated, except as they lay on the dock ex ship's tackles."

In upholding the certificate as issued the arbitrators said:

"It will be noted that there is no claim therein (the Chief Inspector's statement) that Certificate No. 38888 was and is invalid or that the beans inspected may not have been or were not in whole

or in part the identical lot. Trade of the port largely is based upon the certificates issued by the Chamber of Commerce, and in the absence of fraud or collusion, such certificates are accepted at their face value, especially when contracts are predicated upon the finality of such certificates. In this cause there is no question of fraud or collusion, and at the same time Buyer and Seller have acted in entire good faith. Apart from technicalities set up in this case equity favors the Seller. Therefore, the arbitrators, after the fullest consideration, confirm their findings of September 22, 1920." (Foreign Commerce Association Arbitration No. 26, 1920).

When Contract Specifies Certificate of Chamber of Commerce at Port of Entry, Certificate Issued by Another Organization Not Sufficient—Alteration of Certificate—A sold to B 100 tons **Korean Kotenashi** beans, 1919 Crop, C. H. P. F. A. Q. of the season, certificate of Chamber of Commerce at port of entry as to quality and season to be final. The Buyer claimed the right to reject on account of the failure of Seller to furnish a certificate of the Seattle Chamber of Commerce and Commercial Club, Seattle being the port of entry. Instead of such certificate the Seller furnished a certificate of the Foreign Commerce Association of the Pacific Coast.

The record showed that on July 23rd Seller asked for shipping instructions and Buyer requested examination, which was refused, Seller claiming that Chamber of Commerce certificate was to be final, and that the same would be furnished with documents in accordance with the terms of the contract. Under date July 27th Buyer gave shipping instructions directing the shipment of three cars to Boston. Under date August 13th, Seller presented his invoice with attached weight certificates and bills of lading but without the requisite certificate of quality. Subsequently Seller presented Seattle Chamber of Commerce certificates Nos. 13663 and 13664 which classified the beans as Handpicked Kotenashi Beans (Korean Type) F. A. Q. 1919 Crop. Buyer took exception to term Korean Type. Under date August 25th Seller presented the same certificates which had been altered, the words Korean Type being scratched out and the words Choice Handpicked Korean inserted. In this connection the record shows that Seller was not the original supplier and that the certificates in question were obtained by this Seller from the original supplier and this Seller in no way was responsible for the alteration of this certificate. Buyer refused to accept this certificate and at the same time cancelled the original shipping instructions and insisted upon diversion to Albion, New York. The cars in question could not be diverted at Albion, having

passed that point, and duly arrived in Boston. Buyer also contended that by reason of the insufficiency of documents furnished by the Seller he was compelled to substitute other cars against his contracts.

Held, That it is a well settled principle that on F. O. B. sales the right of one diversion is presupposed, but if Buyer delays his request for such diversion beyond the time when it may be attempted or effected by Seller using due diligence, Seller cannot be expected to perform the impossible. Seller did not conform to his contract requiring a certificate of quality of the Seattle Chamber of Commerce, Seattle being the port of entry. This defect was not cured by the certificate of the Foreign Commerce Association, which was not provided for in the contract. In the opinion of the arbitrators, furthermore, the original importer was guilty of reprehensible conduct in altering an official certificate that had been issued by the Seattle Chamber of Commerce. At a time when all commercial organizations on the Pacific Coast are doing their utmost to insure the integrity of certificates of inspection this record stands undisputed that the original importer is guilty of extreme bad faith bordering on deliberate fraud.

In the light of all the circumstances, Buyer is not entitled to an outright rejection. He having paid for the goods and having made claim for an allowance, the arbitrators are of the opinion that Rule 13 of the Foreign Commerce Association of the Pacific Coast governs the transaction, and he is therefore granted an allowance of 50 cents a 100 pounds on the entire shipment, this representing the difference between the sales price and the market price at Boston, where the goods were sent without proper covering documents. (Foreign Commerce Association Arbitration No. 25, 1920).

C. I. F. and C. & F.

Term C. I. F. Defined—The term C. I. F. means the price or cost of the goods and charges thereon until shipped, the premium of insurance on the goods, and the cost of the freight thereon from point of shipment to point of destination.

Under this kind of a contract a Seller is obligated:

1. To furnish goods free of all charges and incumbrances at point of shipment.
2. To arrange the usual marine insurance. (This does not include war risk insurance, which is a separate risk).
3. To make the contract of affreightment for transporting the goods on a vessel or vessels destined from the point of shipment to the point of destination, and pay the freight charges or deduct the same from the invoice.
4. To obtain and send to the Buyer clean ocean bills of lading or through rail and ocean bills of lading.

Under a C. I. F. contract, Seller is *not* responsible, after issuance of the bill of lading, for any loss and/or damage and/or deterioration and/or contamination of goods in transit, or charges of whatsoever nature incurred after shipment, nor for non-arrival of all or a portion of the goods covered by the contract.

And a Buyer is obligated:

1. To accept and pay for the goods, less freight charges if freight has not been prepaid.
2. To assume all risk of leakage and/or loss and/or damage and/or contamination and/or deterioration of goods after shipment if such risk is not covered by insurance, and if so covered, must look to the insurance company or carrier, as the case may be, for adjustment and payment of any and all claims howsoever arising after shipment of goods.
3. To pay all customs charges, if any, at destination of shipment, and all dock, lighterage, unloading and/or charges of whatsoever nature after shipment of goods.
4. To pay for war risk insurance, if desired.

Term C. & F. Defined—The term C. & F. means the price or cost of the goods and charges thereon until shipped, and the cost of the freight

thereon from the point of shipment to the point of destination. The duties and obligations of Seller and Buyer are the same as under C. & F. except that Seller does not place marine insurance upon the goods.

Under a contract specifying C. I. F. Havana, Cuba, rejection of documents covering **Rice** shipped per a vessel routed via Suez Canal was not sustained since no vessel or route was designated in the contract. (Rice Association of California Arbitration No. 9, 1920, Page 99).

Under a C. I. F. Santiago, Cuba, contract, delay in receipt at San Francisco of Oriental shipping documents covering **Rice** will not justify rejection by Buyer, especially when Seller guarantees Buyer against expenses that might be incurred at port of destination by reason of vessel arriving prior to receipt and tender of documents. (Rice Association of California Arbitration No. 18, 1920, Page 129).

Where contract specifies February-March shipment, C. I. F. Santiago, Cuba, Seller is under no obligation to notify Buyer that the cargo is afloat at the time of making the contract, the Seller being obligated only to make shipment within the specified period. (Rice Association Arbitration No. 18, 1920, Page 129).

A *typewritten* clause in an insurance policy, furnished under a C. I. F. sale, which conflicts with a *printed* clause, controls the policy. (Rice Association of California Arbitration No. 18, 1920, Page 129).

Where **Coconut Oil** is sold under a qualified C. I. F. contract, i. e. a contract specifying cost, insurance and freight from point of shipment to destination, with a proviso that free fatty acids content shall be determined at destination, contamination of the Coconut Oil with mineral oil after shipment is a risk assumed by Buyer under the C. I. F. stipulation. (Foreign Commerce Association Arbitration No. 36, 1921, Page 59; see Dissenting Opinion, Page 61).

A *typewritten* stipulation in a contract specifying that the terms are C. I. F. controls conflicting ex dock provisions which are *printed* therein, it being the rule that a contract cannot be both C. I. F. and ex dock. (Rice Association Arbitration No. 14, 1920, Page 58. Affirmed on Appeal by San Francisco Chamber of Commerce Arbitration on Appeal, 1920, Page 59).

When there is doubt as to whether a contract is C. I. F. or Ex Dock and the parties hold divergent views as to the intent, arbitrators will interpret the meaning of the contract according to the preponderance of evidence. (San Francisco Chamber of Commerce Arbitration, 1917, Page 73).

Where a Buyer desires to avoid all responsibility for **Coconut Oil** from time of shipment at foreign port until arrival at American

port of entry he must purchase on delivered terms, either F. O. B. cars, Pacific Coast, ex dock or ex ship. (Foreign Commerce Association Arbitration No. 37, 1921, Page 63).

Under a C. I. F. contract covering **Peanut Oil** under 2 per cent free fatty acids as per Hong Kong government Analyst's Certificate, a Buyer is not entitled to a determination of acidity at destination, the acidity at point of shipment being the controlling factor. (San Francisco Chamber of Commerce Arbitration, 1919, Page 64).

Under a C. I. F. contract covering **Peanut Oil,** loss in weight is for the account of Buyer. (San Francisco Chamber of Commerce Arbitration, 1919, Page 64).

When a C. I. F. contract gives the basis of the freight rate and specifies either of two routes and gives the Buyer the option of selecting the route, any additional cost to be on Buyer's account or any saving to be for his benefit; and where the rate of freight to be paid by Seller was fixed by contract and the rate of exchange likewise stipulated, any additional expense on account of freight and exchange is for account of Buyer. (San Francisco Chamber of Commerce Arbitration, 1919, Page 65).

When a C. I. F. contract specifies installment payments, and the last payment is to be upon *arrival of engines at San Francisco,* and there is a further provision that *Seller is not to be held liable for damages, or for loss of vessel or vessels, or for all or part lost en route or while discharging,* payment of the last installment becomes due when the major portion of the merchandise reaches destination and may not be deferred until the arrival of all of the cases, four of which were delayed by reason of transshipment. (San Francisco Chamber of Commerce Arbitration, 1919, Page 65).

Under a C. I. F. duty paid contract, covering **Rice,** Seller is not responsible for wharfage at port of entry, as duty may be paid before goods are removed from the wharf, while wharfage need not be paid until such goods are so removed. (San Francisco Chamber of Commerce Arbitration, 1915, Page 70).

When a C. I. F. contract is predicated upon a freight rate fixed therein with the provision that any increase in freight shall be borne by Buyer, a Seller may not charge any increased freight without proving that there was an actual increase in the rate upon which the contract was based. (San Francisco Chamber of Commerce Arbitration, 1920, Page 71).

Under a contract specifying C. I. F. Bergen, Norway, covering **Prunes,** Seller is not responsible for deterioration of goods after ship-

ment, and the best evidence of quality at time of shipment is certificate of inspection of Dried Fruit Association of California. (Dried Fruit Association Arbitration No. 1, 1921, Page 47).

When a C. I. F. contract is based upon a specified rate for war risk insurance any increase in such insurance is for the account of Buyer. (San Francisco Chamber of Commerce Arbitration, 1919, Page 65).

A C. I. F. sale has absolutely nothing to do with the time of delivery of the goods; it merely refers to the time of shipment. (San Francisco Chamber of Commerce Arbitration on Appeal, 1919, Page 83).

Under a C. I. F. contract, Seller being unable to ship **Rice** from Havana to Caibarien in bonded rail cars or to obtain steamer space on account of congestion of freight, paid the duty on the goods for his own account and shipped the rice by rail to point of destination. Buyer rejected on the ground that the payment of duty by Seller under a C. I. F. contract was a breach of contract. The rejection was not sustained, arbitrators pointing out that Buyer was in no way injured by Seller paying duty. (San Francisco Chamber of Commerce Arbitration, 1920, Page 65).

Typewritten Stipulations in Contract Abrogate Printed Clauses—Contract Cannot Be Both C. I. F. and Ex Dock—Damage to Cargo Is for Buyer's Account Under C. I. F. Sale— A, a San Francisco importer, sold to B of that city, 250 tons **No. 1 Siam Usual Rice,** June shipment from Hongkong, C. I. F. San Francisco. B sold to A the same quantity and description of Rice under identical terms, except a difference in price. Upon the arrival of the Rice at San Francisco, no documents were exchanged by the parties, A, whose contract with B showed him a profit, billing B for the amount of his profit only. B subsequently contended that 671 bags of the Rice were damaged and made claim for $2,855.77, said to represent the difference paid for the Rice, $13,978.27, and the amount which B obtained from the carrier for the damage to the Rice, namely, $11,272.34.

B based his claim on Clause 6 of the contract, which clause was printed as follows:

> *The goods being for buyer's account and risk as soon as landed. Vessel lost, contract void; goods arriving damaged being for Seller's account, but will constitute a portion of the delivery.*

B claimed that inasmuch as 671 bags arrived damaged, the damaged portion of the shipment was for the account of A. On the other hand, A insisted that the typewritten portion of the contract, specifying that the sale conditions were C. I. F., controlled and superseded the printed

Clause 6, noted above. Such being the case any damage to the cargo en route was for B's account.

Held, That the contract in question is a C. I. F. contract, and consequently any damage is strictly for the account of B. Clause 6 of the contract, being printed, is abrogated by the typewritten specifications of C. I. F. Any amount uncollectible from the carrier on account of the damaged cargo is for B's account, and it is so awarded. (Rice Association of California Arbitration No. 14, 1920).

Affirmed on Appeal—B appealed to the Arbitration Committee of the San Francisco Chamber of Commerce, alleging error on the part of the original arbitrators. The Arbitrators on Appeal said:

"We find that the last portion of Clause 6, relating to damaged goods and referred to by Buyer, cannot be considered alone and that the entire Clause 6 must be considered in this case. The first sentence, *the goods being for Buyer's account and risk as soon as landed* shows that Clause 6, if it stood by itself, would make this an ex dock form of contract. The typewritten C. I. F. clause, written in subsequently, however, is distinctly a C. I. F. form of contract. The dispute in question is regarding which clause governs.

"It is clear that a contract cannot be both C. I. F. and ex dock and the question is, Which contract was in the minds of the parties when they signed? If the parties intended this to be an ex dock contract, then there was no need for inserting the term C. I. F., as the price made would have been ex dock instead of C. I. F. Conversely, if they intended it to be a C. I. F. contract, this Clause 6 is valueless and without force, as it is contradictory to the well known meaning of C. I. F. and the obligations of Buyer and Seller thereunder. It is clear to us that when this contract was made, the specific writing-in of the condition 'C. I. F.' shows that the parties had in mind that this was to be a C. I. F. contract, and we decide that the written specific term C. I. F. supersedes the entire printed ex dock Clause 6, and that this is a C. I. F. contract and the damaged portion of the shipment is, therefore, for account of Buyer. We confirm the award of the Arbitration Committee of the Rice Association of California of April 30, 1920. (San Francisco Chamber of Commerce Arbitration on Appeal, 1920).

Responsibility for Contamination with Mineral Oil of Coconut Oil Sold Under Qualified C. I. F. Contract—Buyer's Risk After Shipment of F. A. Q. Grade—Interpretation of Clause—A Manila, P. I., manufacturer sold a quantity of "Manila Crude **Coconut Oil,** fair average quality, basis 5 per cent, maximum 7 per cent free fatty acid on arrival at New York" to a Buyer in the

United States. The oil was to be shipped in bulk. The contract provided: "Samples to be drawn and analysis to be certified by licensed chemists of both Buyer and Seller." The price was on a C. I. F. basis, New York, net landed weight. Payment was to be made by letter of credit covering 95 per cent of the contract against shipping documents. Subsequently the parties agreed upon shipment to San Francisco at a modified price.

Upon arrival of the oil at San Francisco and immediately after analysis of samples taken from the steamer's tanks, the Buyer made claim for a refund on account of the oil having been contaminated with mineral oil and he alleged it was not a good delivery. The claim was for one cent a pound on 778.71 long tons, or $17,443.10. Buyer contended that the contract was a modified C. I. F. contract, and that its terms permitted sampling and determination as to whether it was "fair average quality" on arrival, in addition to the analysis for free fatty acids. He claimed that a florescence, such as is occasioned in coconut oil after contamination with mineral oil, is a decided detriment to the oil itself, which may not be used for edible purposes; that this florescence was present after refining, if indeed it was not more marked, and that the product could be used only for the manufacture of cheaper soaps. Buyer insisted that because of this florescence, the oil was not F. A. Q. at Pacific Port of Entry, as required by the contract.

Seller claimed that the contract was essentially C. I. F. in its terms, and that the only modification was as to free fatty acids and landed weights; that the oil was the property of the Buyer from the moment of shipment at Manila; that he had obtained a surveyor's certificate of the cleaning of the steamer's tanks prior to loading the oil; that it was clearly established that he had shipped F. A. Q. coconut oil; that the Buyer had withheld payment of 5 per cent of the contract price to adjust allowances for free fatty acids, if any were allowable on account of the acidity being more than 5 per cent specified in the contract, and for adjusting on the landed weights; that the only risks he had assumed beyond those usual and incident to C. I. F. contracts was the guarantee that the oil would not exceed 7 per cent in free fatty acids, and the loss in weight in transit, if any.

The majority arbitrators in this matter said:

"The point at issue really is the interpretation of the clause in the contract reading:

> Manila Crude Coconut Oil, fair average quality, basis 5 per cent, maximum 7 per cent free fatty acids on arrival at New York (San Francisco), samples to be drawn and analysis to be certified by licensed chemists of both Buyers and Sellers.

"From the literal wording of this clause it may equally well be read to convey that, (1) the quality, including acidity, is guaranteed by Seller at the time of arrival at New York, or (2) that the intention was to ship Manila Crude Coconut Oil, fair average quality, at time and place of shipment, (basis 5 per cent, maximum 7 per cent free fatty acids only on arrival at New York).

"In this contract there are, for want of a better term, what may be called three 'straddles', which, however, are not unusual in a C. I. F. contract. These are: First, the quality 'straddle,' whereunder it is customary to guarantee only acids on arrival; second, landed weight, whereunder it is customary to accept Buyer's weights at destination; third, Buyer reserving the balance of 5 per cent of the value to take care of the weights and free fatty acids adjustments, if any.

Held, That in the importing business, under contracts of this character, it is customary for the Seller to guarantee in the way of quality only such constants as he may be able reasonably to control, and it is usual in importing oil to guarantee only acidity. As this is the custom of the trade it must be assumed, in the absence of definite information to the contrary, that this contract guaranteed only free fatty acids, and could not be interpreted as providing the additional insurance against contamination. The evidence shows that the Seller had performed all that was required of him under the contract insofar as procurement of freight, responsibility of consignee thereunder, cleaning of steamer's tanks, furnishing of Surveyor's certificate, and shipment of contract quality, and that he also provided marine war risk insurance in accordance with the usual custom under C. I. F. terms. There was every evidence to show that Manila Crude Coconut Oil F. A. Q. was shipped. If the Buyer had desired to purchase oil F. A. Q. at point of American delivery, it is the opinion of the arbitrators that he never would have accepted this form of contract. Furthermore, as to the intent of the parties, an examination of the telegrams passing between Buyer and Seller at the time of sale clearly indicates to the arbitrators that both parties considered this transaction C. I. F., except as to acidity and outweights, and there was no suggestion of a guarantee against contamination en route to port of entry. The claim of Buyer is disallowed and Seller is entitled to payment in full for the oil. (Foreign Commerce Association Arbitration No. 36, 1921).

Dissenting Opinion—I cannot agree with the majority decision. This is not an unqualified C. I. F. sale and Seller has assumed some risks that are not incident to unqualified C. I. F. sales.

"Under sales C. I. F. net landed weights, or C. I. F. subject to inspection and/or analysis upon arrival, or C. I. F. payment in exchange

for delivery order on dock, etc., it is true that goods are for Buyer's account as soon as delivered to and accepted by the ocean carrier, and all terms and conditions of the bill of lading are accepted and agreed to by Buyer *except* insofar as the terms and conditions of the contract qualify the usual C. I. F. sale.

In this contract the clause reading:

> Manila Crude Coconut Oil, fair average quality, basis 5 per cent, maximum 7 per cent free fatty acids on arrival at New York, samples to be drawn and analysis to be certified by licensed chemists of both Buyers and Sellers,

would ordinarily be interpreted to qualify the usual C. I. F. sale as regards determination of quality being made at point of arrival, not only as to the free fatty acids content, but also as to whether the oil is fair average quality, thus putting on Seller the burden of deterioration in transit.

"The telegrams passing between the Buyer and the Seller's broker at the time of sale are silent as to where quality is to be determined and are therefore of no assistance as indicating the intent of the parties. If the telegrams without any written contract were to be interpreted they could only be taken to mean that the quality was to be determined at Manila, not only as to F. A. Q. but as to acidity. Therefore, the telegrams should be disregarded and this case decided upon its merits from a construction of its language, which should not be forced to agree with a trade custom.

"It would appear that Seller in the printed language has expressed the opposite of the custom of the trade as being the intent of both parties to this contract, and for this reason I find for the Buyer, believing that the Seller, had he intended only to guarantee acid content on arrival, would have done so by making clause read along the following lines:

> Manila Crude Coconut Oil, fair average quality at time of shipment. Basis 5 per cent, maximum 7 per cent free fatty acid on arrival at New York, samples to be drawn and analysis as to free fatty acid content to be certified by licensed chemists of both Buyers and Sellers.

"It is a very serious matter indeed to upset the clear phraseology of a contract, in order to conform to an established trade custom. Buyer and Seller, in signing a contract, are presumed to have clearly in mind the points on which they have agreed and if the language of the contract is clear it should be upheld even though it differs from trade custom. Were the contract ambiguous in language, then it

would be time enough to consider evidence as to the intent of Buyer and Seller, and as to the custom of trade.

"Being in the minority, it is of no avail to assess damages. I am of the opinion, however, that the allowance claimed by Buyer is perhaps in excess of the real measure of his damages. Were the majority finding in favor of the Buyer I should require evidence as to the actual out-of-pocket loss sustained, if any, before reaching a finding as to the amount of damages." (Foreign Commerce Association Arbitration No. 36, 1921).

Similar Issue Decided by Other Arbitrators—Buyer's Responsibility for Deterioration in Transit—Qualified C. I. F. Contract—Subsequent to Arbitration 36 reported in the foregoing, a somewhat similar matter came before another arbitration board of the Foreign Commerce Association, the arbitrators having no knowledge of the award in Arbitration 36. The facts of this matter are as follows:

A San Francisco Agent, acting for his disclosed principal, a Manila, P. I., oil mill, sold a quantity of Manila Grade **Coconut Oil,** 500 tons each to be shipped April-May and May-June to the Pacific Coast. Seller declared the S. S. "Ecuador" as to 500 tons, but this vessel having been disabled, he substituted, with Buyer's approval and acceptance, the S. S. "Imlay" for both lots of the oil. The contract provided:

"Quality: Basis five (5%) per cent, maximum seven (7%) per cent free fatty acid, one-half per cent (½%) allowance, account excess acid, for each point in excess 5%.

"Inspection: Samples to be taken and analysis to be made by Curtis & Tompkins, San Francisco, such analysis to be final."

Upon arrival of the oil at San Francisco, Seller caused analysis as to acidity to be made by Curtis & Tompkins, chemists, and acidity content was shown to be 5.1 per cent. Buyer caused analysis to be made by the same chemists, who certified that there was florescence present before and after refining. Buyer claimed that this was due to contamination by mineral oil. Buyer contended that the contract was a modified C. I. F. contract, and that the inspection clause covers the quality of the oil as an entirety, whereas Seller claimed that his only guarantee under the contract was as to acidity of oil on arrival, and that he was to be paid for landed weights. Seller contended that as to all other features of the contract the conditions were C. I. F., and that the oil, provided it came within the acidity limits of the contract on arrival at port of entry, was for the account of the Buyer as soon as shipped at Manila.

Held, That there was a complete meeting of the minds of the parties on a C. I. F. contract, the Seller guaranteeing the acid content of the oil on arrival at port of entry. All of the correspondence passing between Seller's agent at San Francisco and the Buyer leaves no doubt in the minds of the arbitrators that the transaction was on a C. I. F. basis, except as to the acidity of the oil, as already noted. Had Buyer wanted to avoid all responsibility for the oil until its arrival at American port of entry he would have purchased on delivered terms, either F. O. B. cars, Pacific Coast, ex dock or ex ship. The Buyer's claim is disallowed. (Foreign Commerce Association Arbitration No. 37, 1921).

Responsibility for Excess Acidity of Oil on Arrival Under C. I. F. Contract—Loss of Weight—Foreign Certificate of Analysis —A San Francisco merchant purchased from a Hongkong merchant, a quantity of "**Peanut Oil** under 2 per cent fatty acids as per Hongkong Government analysis certificate, C. I. F. San Francisco, California." The transaction was completed by cable.

On arrival of the oil at port of entry three samples showed free fatty acids to be 2.32 per cent, 2.61 per cent and 2.91 per cent, respectively, and claiming that as delivery was not as per contract, which called for less than 2 per cent, Buyer demanded an allowance of one cent per pound on the 1,000 case shipment, amounting to $744.31. Buyer also claimed an allowance of $96.73 for shortage in landed weights of the 1,000 case lot and $297.83 for shortage in the 2,000 case lot, the total claim being for $1,138.87 for shortage and quality.

Held, That the loss in weight on both lots of oil must be borne by Buyer as neither his letter of March 14, 1919, asking for offers of Peanut Oil, nor cables exchanged making and accepting offers, specified that the oil was to be sold under landed weights. The letters from Buyer of May 3, 1919, and May 5, 1919, confirming cables, refer to landed weights at San Francisco, but the sales had been made and the contracts in this case had been drawn by Seller before these letters could have been received, as the contract for the second and later sale is dated May 19, 1919, and merely specifies price to be C. I. F. San Francisco, California. Buyer should have specified landed weights in his cable acceptance, if such was his desire, as offer did not specify landed weights. The loss in weights as shown by Weigh Master's Certificate appears to be only the usual loss in shipment of this oil.

As regards the claim for allowance on quality of the 1,000 case lot, the contract for this lot dated May 19, 1919, specified "China Peanut Oil under 2 per cent fatty acids as per Hongkong Government analyst's certificate", and Buyer accepted this contract and it is submitted by

him as the contract in this case. The Government Analyst's Certificate submitted to us shows free fatty acids to have been 0.9 per cent when the oil was shipped. If Buyer desired that the oil should be under 2 per cent free fatty acids upon arrival he should have so specified in his cable acceptance or should have notified Seller by cable upon receipt of the said contract, as he then had knowledge that quality was based upon analysis at Hongkong and it is a well known fact that this oil gains acidity during shipment. The contract in this case was C. I. F. San Francisco and the oil therefore was the property of Buyer as soon as shipment was made, and if the quality was as per contract at that time, which the Government analysis at Hongkong shows to have been the case, shipment was made by Seller as per contract. Buyer is entitled to no allowance on account of excess acidity, Seller having fulfilled terms of his C. I. F. contract. (Chamber of Commerce Arbitration, 1919).

Rice Sold C. I. F. in Bond Cuban Port—Payment by Seller of Duty—Congestion of Harbor—Buyer Not Injured—A Pacific Coast importer sold a quantity of **Rice** to a San Francisco merchant. Shipment was specified to be from Hongkong, direct or indirect, to Caibarien, Cuba. The rice was priced C. I. F., in bond, Caibarien. Owing to congested conditions in Cuba, Seller was unable to obtain steamer space or bonded rail cars from Havana to Caibarien, and hence paid the duty at Havana for his own account and shipped the rice by rail to its destination. Buyer contended that this was a breach of contract, and therefore he was entitled to reject the Rice.

Held, That Seller used due diligence and acted for the best interests of all concerned in paying duty and shipping by quickest dispatch to port of destination, i. e. Caibarien, and absorbing the duty for his own account. It is an admitted fact that there was an unprecedented congestion and lack of bonded cars and available steamers at that time and up to present date, thereby precluding a Seller from strictly executing a contract calling for delivery in bond to an out-port in Cuba.

Seller had the option of shipping by vessel or by rail from Havana to Caibarien and his responsibility, under the contract, ended upon arrival of carrier at destination and Seller was not obligated to deliver the goods in any warehouse. Buyer shall accept the rice and pay invoice cost, without interest. (San Francisco Chamber of Commerce Arbitration, 1920).

Responsibility for Extra Freight on Changed Routing Under C. I. F. Contract—Transhipment Permitted—Extra War Risk

—**Late Arrival of Part of Shipment**—On May 23, 1916, A sold to B two Bolinder engines to be manufactured in Sweden and shipped to San Francisco, shipment to be made at Stockholm within six months from date of the contract. Payment for the engines was to be in three installments, the third payment to be *upon arrival of engines at San Francisco.* The contract contained the following clause relative to shipment:

> "Shipment: To be made by steamer and/or steamers direct or otherwise from Sweden to San Francisco via Panama Canal or other route at Purchaser's option, any additional cost to be on Purchaser's account or any saving to be for Purchaser's benefit."

In August, 1916, Buyer was notified that the engines were ready for shipment and on the 25th of that month Seller was notified to ship the same around Cape Horn, instead of via the Panama Canal. Seller accordingly made shipment per M/S "San Francisco," the bill of lading being dated February 9, 1917, although, due to war conditions, the vessel did not actually sail until July 19, 1917. The "San Francisco" transhipped all her cargo at Arica, South America, and the shipment of engines, with the exception of four cases thereof, were forwarded on the S. S. "Pennsylvania", arriving at San Francisco December 17, 1917. The four cases short shipped went forward on the S. S. "Santa Inez", arriving at San Francisco February 21, 1918. On December 17, 1917, Seller rendered a bill to the Buyer for the third payment on the engines and included therein claims for the following extra cost of shipment via Cape Horn instead of via the Panama Canal, which he asserted was on Buyer's account under the "shipment" clause in the contract:

Extra freight charges	$1,186.50
Extra war risk insurance	1,680.00
Extra Marine Insurance	360.00
Additional exchange	996.04
Total	$4,222.54

Buyer disputed the correctness of above claim and due to delay in settling the matter, Seller claimed, in addition, interest on third payment, $13,480.60 and on above amount of extra cost from date of arrival of first portion of shipment, December 17, 1917, to date of agreement to arbitrate, April 20, 1918.

Taking up each of these claims separately, the arbitrators found as follows:

Extra Freight Charges—Seller charged freight on 83.10 cubic tons at the rate of Kr. 89.4. The Committee checked Seller's bill of lading and found that the engines did use the space of 83.10 cubic tons and that Seller paid for said freight at rate of Kr. 89.4. Seller claimed the estimated freight cost via Canal, when making price of engines, at $15 per cubic ton and that at the rate of exchange on December 17, 37c, the extra exchange being divided as per contract, the extra freight on account of shipment via Horn was $1,186.50, which amount is claimed. No basis of freight via Canal was given in the contract but the Committee through its own independent investigation has determined that a rate of approximately $15 per cubic ton via the Canal did prevail about December, 1917, at which time the engines were ready for shipment, and we fix $15 per cubic ton as a proper basis for estimating any increase in freight due to change in routing.

In view of the fact that Buyer ordered the engines shipped via the Horn, which he had the right to do, any increase in freight cost thereby must be for Buyer's account.

We decide that the claim for some increase in freight charges is a just one and that Buyer shall pay same. We fix the total amount of said increase to be paid by Buyer to Seller at $1,156.37, which sum, for reasons hereinafter given under the item "Additional Exchange", is made up from the extra freight due on each of the two shipments based on the rate of exchange at the date of arrival of each shipment, as follows:

Shipment arriving December 17th estimated at	68.1 cubic tons
Shipment arriving February 21st estimated at	15 " "
Total	83.1 " "
68.1 cubic tons x Kr. 89.4–Kr. 6088.14 x 32¾c	$1,993.87
15 cubic tons x Kr. 89.4–Kr. 1341.00 x 30½c	409.00
Total Freight	$2,402.87
Less 83.1 cubic tons estimated at $15	1,246.50
Total Extra Freight	$1,156.37

Extra War Risk Insurance—Seller claimed he estimated war risk insurance at 2 per cent when making price in contract, but that he had to pay 5½ per cent and claimed the difference, 3½ per cent, should be for Buyer's account. It was admitted, at the hearing, that

no definite rate could be secured until time of shipment, due to changing war conditions. The Committee upon investigation determined that a rate of 4 per cent via the Canal could have been secured at time of shipment and that shipment via the Horn was considered a greater war risk and higher rates charged therefor. We therefor fix 4 per cent as the correct basis for estimating war risk insurance via the Canal in this contract and we decide that the extra insurance of 1½ per cent on $48,000 amounting to $720 is to be paid by Buyer to Seller.

Extra Marine Insurance—Seller claimed that he figured marine insurance under the terms of contract (F. P. A.) on this shipment at 1¼ per cent, but was charged 2 per cent and he claimed the difference of ¾ per cent was for Buyer's account. We have, upon investigation, determined that Seller did pay 2 per cent and that the extra insurance for shipment via the Horn was ¾ per cent and for transhipment at Arica was ¼ per cent. Also that the shipment was actually made F. P. A. and that the rate via Panama therefor was 1 per cent. Therefore, we decide that the extra cost to Seller for shipment via the Horn was ¾ per cent and that Buyer is to pay Seller $360 as claimed.

Additional Exchange—In the contract the rate of exchange was "based upon exchange at 28½c per Swedish Krown" and "any difference in telegraphic exchange to be divided equally between Buyer and Seller." Seller claimed payment for final installment on those portions of the engines that arrived December 17, 1917, at 37c exchange, the rate that day, and on the four cases arriving February 21, 1918, at the rate of 32½c prevailing that day. Buyer claimed no payment on third installment was due until *all* portions of the engines arrived and that the rate of exchange on the entire shipment should be the rate prevailing February 21st, the date the last four cases arrived, for reasons set forth in his statement. We cannot agree with Buyer's contention. The contract does not provide that the third installment is to be paid upon *complete delivery*. It does provide for payment *upon arrival of engines at San Francisco*. Under the item "Delivery" in the contract is an exception clause, viz.: "The Seller is not to be held liable for damages, * * *, or for loss of vessel or vessels, or for all *or part lost* en route or while discharging." If some parts of the engines had been lost en route or while discharging Buyer could not claim under this contract that he was released from paying Seller for the portions that were delivered. He would look to the vessel or the insurance to reimburse him for the parts lost.

Both parties admit this was a C. I. F. contract. Seller shipped

the engines complete on vessel as instructed by Buyer and received bill of lading for same. He had the option under the contract to ship the engines by more than one vessel. Buyer knew shipment could be by more than one vessel and also that the Johnson Line bill of lading provided for transhipment en route if it desired to do so, and therefore there was no certainty that shipments via the Horn would arrive at the same time, although there was a reasonable assurance that would be the case via the Canal.

We, therefore, find that Seller, having made complete shipment as directed by Buyer, was entitled to payment for each arrival of the shipment at the time it arrived and that the rate of exchange should be on that basis.

We decide that Seller is entitled to payment on the estimated value of the shipment arriving December 17, 1917, which we fix at $10,230.60, at the rate of exchange on that date, viz. 37c, and that his portion of the additional exchange on said amount is 4½c or $434.80.

That Seller was entitled to 2c additional on the estimated value of the four cases arriving February, 1918, the rate that day being 32½c, which value we fix at $3,250 and the additional exchange thereon being $65, making the total amount of additional exchange to be paid Seller $499.80.

Interest.—For the reasons set forth under above item "Additional Exchange" we decide that Seller was entitled to reasonable interest, which we hereby fix at 6 per cent per annum, on the aforesaid estimated one-third values of the two shipments arriving December 17, 1917, and February 21, 1918, respectively, from said dates to April 20, 1918, as follows:

$10,230.60 at 6 per cent for 4 months 2 days	$208.00
3,250.00 at 6 per cent for 1 month 29 days	31.91
Total interest on third payments	$239.91

We also decide that Seller was entitled to interest at same rate on the amounts herein allowed him for extra freight, extra war risk insurance, extra marine insurance and additional exchange as follows:

Arrival December 17—82 per cent of total shipment.

Arrival February 21—18 per cent of total shipment.

82 per cent of $2,636.17—$2,243.66 at 6 per cent, 4 mos. 2 days	$45.62
18 per cent of $2,636.17—$492.51 at 6 per cent, 1 mo. 29 days	4.78
Interest allowed on extra cost	$50.40

Recapitulation.—Buyer shall pay to Seller in full settlement of the claims in this case the following amounts:

For extra freight charges		$1,156.37
For extra war risk insurance		720.00
For extra marine insurance		360.00
For additional exchange		499.80
Total allowance on claim for $4,222.54		$2,736.17
Allowance for Interest:		
Interest on third payments	$239.91	
Interest on above extras allowed	50.40	
Total Interest		290.31
Total amount to be paid to Seller		$3,026.48

And pursuant to the terms of that certain agreement dated April 20, 1917, and signed by both parties to this controversy, submitting this case for arbitration by the Arbitration Committee of the San Francisco Chamber of Commerce, it is ordered that the attorneys of the respective parties be and they are hereby notified to pay, from the sum of $4.222.54 deposited in bank, subject to their joint check, to Seller the sum of $2,736.17, as above awarded to him, and to pay the remainder of said amount so deposited, viz.: $1,486.37, to the Buyer.

One of the arbitrators dissented, saying:

"I agree with the above decision on all items except those of 'Additional Exhange' and 'Interest', to which I dissent as I believe the rate of exchange and the interest should be based upon the date of the arrival of the last portion of the shipment, February 21, 1918, because I consider the engines had not arrived until that last portion arrived."

Under a C. I. F. Contract, Duty Paid, Seller Is Not Responsible for Wharfage at Port of Entry—C. I. F. Defined—Foreign Certificate of Quality Governs—A Pacific Coast importer sold to a New York Buyer certain shipments of No. 1 Siam Brewers' **Rice.** Seller guaranteed the rice would be delivered to steamer at Hongkong in first class condition. Risk of deterioration or development of weevil in transit from Hongkong was assumed by Buyer. The rice was priced C. I. F. and duty paid, Seattle, Wash.

Buyer claimed that the rice was of inferior quality and that its condition was unsound; that it was infected with webs and worms and that it must have been unsound when shipped at Hongkong. Buyer also demanded a refund of $282, wharfage paid by Buyer at Seattle,

on the ground that the contract was C. I. F. duty paid, Seattle, and the wharfage therefore should have been for Seller's account.

There were in evidence certificates of quality of Messrs. Goddard & Douglas, marine surveyors at Hongkong, certifying that the shipments had been examined on board the lighters at Hongkong, that the rice was in sound condition, free from weevil or other vermin and in good order for shipment to destination, and that the shipments were of Fair Average Quality of the grade specified.

Held, That as the certificates showed that this shipment of rice, as per bill of lading, was made on August 26th and the surveyors' certificates showed that their examination was made on or about the same date, it is evident that the Buyer's contention that the rice deteriorated in quality and condition while waiting at Hongkong prior to shipment is incorrect, and in the absence of evidence that the rice was not in sound condition the certificates of the surveyors are accepted that the shipments were properly made.

Second—As regards Buyer's claim for a refund of $282 wharfage paid at Seattle, this claim cannot be allowed. A C. I. F. shipment, duty paid, does not mean that Seller must pay wharfage before paying duty, as duty can be paid before the goods are removed from the wharf, while wharfage need not be paid until such goods are so removed. The Seller, therefore, is responsible for the cost of the goods, the insurance, freight and the duty, and any other charges accruing, including wharfage charges, if any, must fall upon the Buyer. (San Francisco Chamber of Commerce Arbitration, 1915).

When Sale Is Predicated on Certain Freight Rate and Any Increase Therein to Be for Buyer's Account, Seller Must Prove Such Increase—A San Francisco importer sold a quantity of Ceylon Desiccated **Macaroon** to a San Francisco merchant, and the goods were shipped in two vessels.

In this case Seller charged Buyer $303.57 on the first shipment and $341.14 on the second shipment for alleged freight difference, claiming that Seller had been charged that difference by his Colombo supplier and that it was agreed, when the sale was made, that any change in freight or exchange was to be for the account of Buyer.

Buyer disputed these extra charges, claiming that no freight rate was designated when sale was made and that it had not been established that there was any change in the freight rate from the time he commenced negotiation with Seller.

It was in evidence, through cables exchanged, that in the previous negotiations between Seller and his Colombo supplier, the quotations

made were for New York delivery; but this was prior to Seller's negotiations with Buyer, who, on July 8, 1919 bought for delivery at San Francisco, any increase in freight (to San Francisco) to be for Buyer's account.

Seller's purchase of the goods was based upon a cablegram from the Colombo supplier sent June 30, 1919, and received July 6, 1919, which quoted a C. I. F. price for shipment *to New York,* subject to any increase in freight or exchange. Seller's cablegram of July 8, 1919, accepted the foregoing offer but specified shipment to San Francisco.

Seller's supplier, in a letter dated July 29, 1919, called attention to the fact that in his cable of June 30th he did not mean an increase of freight to San Francisco over New York rate, but meant any increase of freight over the then present rates ruling.

The debit note of Seller's supplier of August 4, 1919, for $303.57 freight difference is based upon another shipment made by him *to New York* on July 20, 1919, and this rate is based upon the then rate of exchange, the rate charged being in English Sterling, while the freight charged by him on the shipment in this case, as shown on the bill of lading of the S. S. "Colusa" is for shipment to San Francisco, and the rate therein is $30 gold per ton of 40 cubic feet.

Held, That Buyer in this case was not interested in any rate to New York, as he purchased for delivery at San Francisco. Seller has not shown what was the freight rate upon which the C. I. F. price was quoted, although given full opportunity to do so. Buyer, on the other hand, has submitted to the committee bills of lading for the same class of goods shipped from Colombo to other San Francisco importers by Pacific Mail Steamship Company vessels on May 31st and July 25, 1919, and also subsequent to the date of the shipments in dispute, in which the same rate of $30 per ton of 40 cubic feet was charged and he claims this was the normal rate. After carefully examining all the evidence submitted, we find that no increase in freight rate from Colombo to San Francisco has been shown, and it is in evidence that the rate charged by Pacific Mail vessels before and after the sale in question was made was $30 per ton, which was the rate charged on the shipment in dispute. Seller is not entitled to charge Buyer with an extra freight difference of $303.57 as claimed on the 250 cases shipped July 28, 1919. This award shall apply to the second shipment of 250 cases made August 20, 1919, as it was agreed by the parties at interest that any decision made should apply on both shipments. (San Francisco Chamber of Commerce Arbitration, 1920).

Arbitrators Will Interpret Contract Provisions When Parties Disagree as to Whether Sale was C. I. F. or Ex Dock—Responsibility for Excess Charges—A San Francisco importer sold to a manufacturer at Portland, Ore., a full cargo of **Copra** ex the barkentine "Alta," and there arose a dispute as to the responsibility for certain extra charges resulting from the discharge of the copra at Portland. The transaction was based upon an offer and acceptance under dates of July 14, 1917, and July 16, 1917, respectively.

The Seller contended that he intended and understood his offer covered a C. I. F. shipment, while the Buyer maintained that the contract was for copra ex wharf. The contract specified ex wharf net landed weights. The Seller insisted that the omission of a comma after the word *weights* sustained his contention that the contract was intended to be C. I. F. and that the weights were to be net landed.

When the copra was unloaded extra expense was incurred, and the real question at issue was who should pay therefor.

The arbitrators said:

"We cannot read the minds of the contending parties to this contract, but the preponderance of testimony as to the intent of the contract when made seems to be in favor of its being an acceptance of a C. I. F. offer. We recommend that hereafter contracts be made more explicit, and if an acceptance departs in any manner from the terms of the offer made, that the items in the offer not agreed to be distinctly referred to in the acceptance.

"In view, however, of the supplementary agreement entered into by both parties at interest on December 29, 1917, that any dispute as to which party is liable for the expense of piling copra on wharf is to be submitted for arbitration, we decide as follows:

"First: We decide that the actual cost of piling and confining the copra on the dock after it has been deposited by the vessel on the dock, would ordinarily be for the account of the consignee or buyer of the cargo, but in this case we believe, the discharge having been expedited by the vessel to an extraordinary degree for the vessel's benefit and through which she secured quick despatch, that an allowance should be made of a reasonable amount of the cost of the piling equivalent to what the vessel thereby saved through such quick despatch, which reasonable amount we hereby fix at the sum of $1,000.00, and we decide that this amount of the cost of piling be for the account of Seller.

"Second: We decide that the cost of shifting copra from lower dock, on account of high water, to upper warehouse, amounting to

$121.86, according to bill of stevedores submitted, shall be for the account of the vessel, as the piling on the lower dock was done without the consent of the Buyer and the vessel was responsible for any error in judgment in that respect.

"Third: We decide that any expense in getting the copra from the vessel on to the dock, including the building of chutes into which vessel would discharge upon the dock, shall be for account of the vessel.

"Fourth: We decide that the other disputed items of expense in connection with the piling of copra on the dock, shall be for the account of Buyer.

"Fifth: We cannot agree with the contention of Buyer that the entire cargo must, if Buyer insisted, be landed upon the dock before it could be tendered to Buyer and that it must be tendered in its entirety.

"Sixth: In making this award, the Committee does not decide upon the correctness of the amounts of the charges made in the various items of expense, as the Committee does not feel called upon to attempt to decide this as the contention between the parties is confined to the point as to which party at interest shall pay the piling charges, or a portion thereof, and the point as to the correctness of the charges made is not raised, nor was any evidence proving same submitted. (San Francisco Chamber of Commerce Arbitration, 1917).

Date of Bill of Lading Governs as to Time of Shipment—Vessel's Clearance Does Not Control—A, a Pacific Coast importer, sold to B, another importer, a quantity of **Rice** February-March-April shipment from Hong Kong to Havana for transshipment to Caibarien. The Buyer sought to reject the rice on the ground that shipment had not been made in contract time, since the S. S. "Tsuyama Maru," which carried the goods, had not arrived at Hong Kong until May 4th and had sailed from there May 7th. The Seller maintained that he had booked the steamer space for the rice on January 9th, that he had delivered it to the carrier April 20th and obtained a bill of lading therefor, that the vessel was scheduled to sail in April but was delayed in arriving on account of weather conditions.

Held, That the shipment in question was an April shipment, as the bill of lading and other documents are dated April 20th, which is evidence that the goods were delivered to the steamship company within the required time, and date of bill of lading is accepted by the trade as the date of shipment, unless it is shown that the bill of lading was fraudulently issued, and there is no evidence that the bill of lading in this case was fraudulently issued. (San Francisco Chamber of Commerce Arbitration, 1920).

Claim

A Buyer who makes an allowance to a subsequent purchaser on the ground of alleged inferior quality, when goods shipped from California arrived in Cuba, without having consulted with the original Seller will not be reimbursed by arbitrators when the original sale was on an F. O. B. California point basis. (California Bean Dealers Association Arbitration No. 27, 1919, Page 75).

A claim for adjustment of weights of **Beans** sold ex warehouse on a basis of *final adjustment on basis of gross delivered weights* was modified and allowed notwithstanding that it was made by Buyer twenty-eight months after the date of sale and purchase and after the shipment out of warehouse of the last carload lot. But both parties were criticised by the arbitrators for lack of due diligence. (San Francisco Chamber of Commerce Arbitration, 1922, Page 260).

Seller Not Liable Under Settlement Made By His Buyer With Another Merchant in Foreign Country—Unauthorized Payment of Alleged Claim—Failure to Permit Sampling—A sold B a quantity of **Tepary Beans,** F. O. B. Sacramento, California, and on instructions of Buyer shipped the goods to Havana, Cuba, where Buyer had resold. The ultimate Buyer in Cuba rejected the beans. Then followed correspondence carried on by cable, with the result that B made an allowance to his Cuba Buyer of $3,800. B therefore demanded $2,600 from A in settlement of B's claim. A insisted that as this settlement was made without his authority, knowledge or consent, with a person not a party to A's contract, he was not responsible therefor; also A claimed that he had been denied the privilege of inspecting the goods at Havana in order to determine for himself the true condition of the beans.

Held, That the original Buyer offers no proof, save his own statement, that the amount of $3,800 was paid in settlement, and if Seller is responsible for any portion of it, why not responsible for the whole amount rather than the $2,600, which Buyer expresses his willingness to accept? Any settlement made by Buyer without consultation with and approval of Seller was made for his own account, and claim of Buyer is disallowed. (California Bean Dealers Association Arbitration No. 27, 1919.)

"Damage" Clause

Effect of Special "Damage" Clause—Buyer Must Take Delivery of All Goods—A sold to B a quantity of **Java Peanuts,** the contract calling for shipment from Java by steamer and/or steamers, direct or indirect to San Francisco, March, 1920. The goods were priced ex dock, duty paid, San Francisco. Shipment was effected within contract period and there was no dispute as to any other condition of the contract not having been met by the parties, except the claim of quality. When tender was made Seller submitted inspection certificates of the San Francisco Chamber of Commerce showing the goods to be F. A. Q. of the season, 1919, showing a *slight trace of vermin at time of inspection.* Buyer rejected the goods. Seller, without waiving his rights under the contract, thereupon offered to make a second tender of another lot of Java Peanuts that had been reconditioned. Buyer refused to consider this second tender.

Seller, in his submission to the Arbitrators, acknowledged that vermin were present in the nuts, but claimed only a slight trace, as stated in the Chamber of Commerce Certificate, and he requested that the Arbitrators determine what percentage, if any, is allowable in F. A. Q. Java Peanuts. He further claimed that the following clause in his contract covering "damage" required Buyer to accept all of the goods with an allowance:

"Should any or all portions of the goods be damaged, Buyer is to accept same, but with an allowance from Seller to be determined by Arbitration, which is to take place in San Francisco."

As to the percentage of vermin in F. A. Q. Java Shelled Peanuts, the Arbitrators refused to fix any such percentage, but confined themselves to consideration of this particular tender. As to the "damage" clause, it was the opinion of the Arbitrators that this had reference to any damage whatsoever that may have arisen after shipment. In this connection, Seller claimed, and submitted in support of his contention, a report of a local marine surveyor, that weevil were introduced from a lot of copra cake stored in the vessel in the vicinity of the peanuts and that the contamination came from such a source. Be that as it may, it was the opinion of the Arbitrators that the "damage" clause fully covered the point and they were not in accord with the views of the Buyer that it was limited only to damage by fire or water, but included all damage.

A careful exmination of all the samples submitted revealed the fact that a portion of the goods did contain vermin, while the greater

portion was of good quality and wholly within the specification of F. A. Q., and under the terms of the contract Buyer must take delivery of all of the goods with an allowance.

Held, That Buyer shall accept tender with an allowance of 2½c per pound on the damaged portion of the shipment, paying the contract price for the undamaged portion. The damaged portion shall be segregated by Seller and Buyer, or their representatives, at Seller's expense, and the allowance shall cover the goods found to be damaged. If Buyer and Seller fail to agree as to the damage, the arbitrators herein will participate in the segregation if requested.

Buyer appealed from the Award, the decision of the Arbitrators on Appeal being as follows:

"After a very thorough consideration of all of the papers in this case, the contentions of the respective parties and the conclusions of the original arbitrators, we are of the unanimous opinion that the printed "Damage Clause" in the contract does not conflict with the typewritten clause *subject to Buyer's inspection on arrival.* The latter clause does not give Buyer the option of rejecting the goods, but merely the right of inspecting to see whether they are of contract quality, and further to determine what if any claim Buyer has a right to make on account of damage. The fact that vessel's name had not been declared has no bearing. It is commercially practicable to recondition peanuts, and Buyer's contention in paragraph 5 of his statement of fact that he cannot determine the amount of the damage, is not well taken.

"As to the length of the voyage from Java to San Francisco, it was known to Buyer at the time he entered into the contract, and has no bearing. If Buyer felt that the dangers incident to transportation by steamer from Java were more than he cared to assume, and further felt that peanuts for shipment from Java during March would probably not be merchantable upon arrival, he should not have signed a contract containing the "Damage Clause" and should further have protected himself by expressing in contract his real intention. The contract as drawn binds Buyer to take delivery of the goods even though damaged, any allowance for damage to be fixed by arbitration.

"As to the Buyer being compelled to file a claim on transportation company, Buyer is incorrect in this. He gets his allowance from Seller under award of the Arbitration Committee, and if Seller feels he has a just claim against the transportation company, it is then up to Seller to recover his loss by prosecuting said claim against the transportation company.

"We likewise do not consider that Seller in any way prejudiced his rights on his original tender, by reason of his offer of other goods which was merely indicative of his desire to, in so far as possible, accommodate Buyer to the extent of his ability.

"The original arbitrators appear to have gone into the case very carefully and to have determined from examination of the samples that, to quote the original decision: "A very careful examination of all the samples submitted reveals the fact that a portion of the goods does contain vermin, while the greater portion is good quality and wholly within the specifications of F. A. Q." They have likewise fixed the sum of 2½c per pound as a fair and equitable allowance on the damaged portion, which we feel, after a personal examination of the still existent samples, should stand.

"We feel that the Findings and Award of the original arbitrators should be sustained, and have no reason to question the finding of fact as to the quality of the peanuts and the proper amount to be allowed. The original decision is therefore affirmed."

Buyer further requested a review and reconsideration of all issues, and the Appeal Board and Original Arbitrators, sitting en banc, rendered the following decision:

"This is a complete reconsideration of the above entitled case based upon a petition of Appellant dated September 20, 1920, asking that the matter be reopened and further considered, on the general ground that a great injustice had been done him both in the original decision of the arbitrators and the appeal decision affirming same. The specific grounds upon which it is alleged this injustice has been done are fully set forth in the petition.

"After full consideration thereof and in the interest of bringing this matter to a final and equitable conclusion, the respective parties were called before the arbitrators and permitted to make oral statements, as a result of which, with the consent of the Respondent, and on the petition of Appellant, the arbitrators consented to reopen this appeal for the purpose of permitting both the original and appeal arbitrators to give the fullest collective reconsideration to all of the issues of this case based upon the entire record, the petition for reconsideration and full additional samples of the shipment drawn by mutual consent of the parties and in their presence by a representative of this Association, both parties hereto having in consideration of such reopening of the case confirmed in writing their former agreements to abide by and act in accordance with this final decision. The petitioner, however, added the following conditions to his confirmation:

(1) "It shall be definitely understood that oral testimony of Java peanut experts will be taken at the hearing.

(2) "That reconsideration by the arbitrators of both the lower and upper boards will be given to each and every point at issue in the controversy, particularly to the so-called damage clause in the contract.

"The foregoing conditions not being included in the confirmation of the Respondent, his consent and approval thereto was obtained.

"After the fullest consideration of this case by the arbitrators, which included a re-examination of the entire record and each and all of the allegations and issues raised thereby; the examination of one hundred and fifty new samples drawn from the shipment in the presence of both parties hereto and also of a representative of the Foreign Commerce Association both by the arbitrators and disinterested Java peanut experts called for the purpose, whose oral testimony was taken in connection therewith, the arbitrators render this their final decision arrived at in exact accordance with the conditions and requests of the respective parties and unanimously find as follows:

"First. That the Damage Clause in the contract unquestionably applies to the condition of the goods if found to be damaged from any cause on arrival, and Buyer, having agreed thereto, is bound to accept the goods no matter what the condition on such allowance as arbitrators find is just.

"Second. That it is an established fact that F. A. Q. Java Peanuts of a given season shipped at the time provided for in the contract, commonly known as between season shipment, usually show more or less deterioration of the character herein alleged and, therefore, Seller was only using ordinary business prudence in inserting the clause in question and Buyer had every reason to expect the peanuts would show a variable amount of deterioration on arrival.

"Third. That the original sampling proved and final sampling confirmed the fact that the shipment both at time of tender and even at the present was, and is, in no way below what might have been reasonably expected for time of arrival.

"Fourth. That, recognizing the difficulty on the part of interested parties to agree upon a fair and proper allowance, the sum of 2½c per pound on the entire shipment is allowed as a fair and proper allowance to be made by Seller to Buyer.

"Fifth. That all costs and charges in connection with shipment accruing prior to August 13, 1920, are for account of Seller and all warehouse charges, insurance and interest at the rate of 6½ per cent on deferred payment to date of compliance with these findings are to be paid by Buyer." (Foreign Commerce Association Arbitration No. 21 and No. 21A, on Review).

Damages for Non-Acceptance.

Buyer, Refusing to Give Instructions and Defaulting in Payment, Penalized for Difference in Market Value—A sold to B 2,000 pockets Fancy California Japan **Rice,** F. O. B. cars San Francisco, December-January shipment. On January 8th and thereafter Seller asked Buyer for shipping instructions, which were never given, and on January 31st Seller billed the goods to Buyer, who refused to pay the invoice. The price of the rice declined from $6.10, the sales price, to $4.15 per 100 lbs.

Held, That Buyer, having given no adequate reason for refusing to take delivery, the Seller is entitled to damages in the sum of $4,175.14, with interest at 6 per cent from January 31st until paid, this amount representing the difference between the sales price and the market price on the date of Buyer's default in taking delivery. (Rice Association of California Arbitration No. 5-A, 1921).

Damages for Non-Delivery

The general rule is that a Buyer is entitled to damages for non-delivery of goods under contract, such damage being the difference between the contract price and the market price on the date of Seller's default of the contract.

Where the market on **Rice** had declined, the claim of a Buyer who alleged damage for non-delivery, in the sum of $2,070, representing the difference between his purchase price and the price at which he had resold to another purchaser, was disallowed. Seller had been prevented from effecting delivery on account of flood conditions and had asked for an extension of time in making delivery. The market had declined between the time of the purchase and the expiration of the delivery period. (Rice Association of California Arbitration No. 4, 1921, Affirmed on Appeal, Page 88).

When **Rice** is sold as "now rolling" subsequent discovery that the rice was short shipped will not excuse Seller, and Buyer will be entitled to actual damages sustained by reason of the short shipment. (San Francisco Chamber of Commerce Arbitration 1919, Page 86).

Under a contract for **Beans** sold for shipment from Japan in the month of May, Seller notified Buyer under date of June 16th that he had failed to make shipment, and the damage was fixed as of that date. (San Francisco Chamber of Commerce Arbitration, 1919, Page 83).

Under a contract covering **Pepper** sold F. O. B. cars, San Francisco, the goods to arrive per a named vessel, Seller, without obtaining Buyer's instructions, shipped the goods from port of entry, and Buyer rejected, being sustained by arbitrators on the ground that shipment was not authorized, and he was awarded damages for Seller's default in the contract. (San Francisco Chamber of Commerce Arbitration, 1918, Page 83).

A Buyer claiming damages for non-delivery of **Rice** sold for November shipment, F. O. B. cars San Francisco, was not sustained on the ground (1) that shipment was delayed by unusual floods which interfered with river and rail navigation at point of origin, and (2) the Buyer's claims for anticipated profits was disallowed upon a showing that the market had declined. (Rice Association of California Arbitration No. 4, 1921, Page 88, Approved on Appeal, Page 90).

When a sale of **Rice** provides that Seller shall submit a sample on a specified date and Seller fails to submit it until too late to effect shipment in contract time, Buyer is entitled to damages, which were fixed at the difference between the sale price and the market price on the date by default. (Rice Association of California Arbitration No. 5, 1921, Page 91).

Under a contract covering **Copra** sold for shipment from "Manila per steamer due to arrive at San Francisco January-February, 1918," failure to make shipment during the period specified or at all will entitle Buyer to damages for non-delivery, the damages being the difference between the purchase price and the market price on the last date possible for arrival of February steamer. (San Francisco Chamber of Commerce Arbitration, 1918, Page 85).

Bona Fide Sales Must Be Fulfilled—Damages for Non-Delivery—Between March 15, 1916, and June 23, 1916, A sold to B twenty (20) cars of California **Beans** and failing to deliver approximately five (5) cars, B submitted a claim for the difference in the purchase price and the market price on the last date shipment could be made of the goods called for in the unfilled contracts. A contended that he had purchased the beans for the account of B and that he had not in fact sold them to B. However, B submitted the original contracts to the arbitrators in support of his contention that the goods had been purchased by him.

Held, That the transactions were *bona fide* sales and purchases and that A had failed to deliver 216,850 pounds of Beans having a present market valuation of $8.30 per one hundred pounds, and that B was entitled to recover the difference between the present market price

and his purchase price, namely an average price of $4.75 per hundred pounds. (California Bean Dealers Association Arbitration No. 22, 1916).

Damages Fixed as of Date of Default in Contract—A sold to B 100 tons Manchurian **Kotenashi Beans** at $4.25 per hundred pounds C. I. F. San Francisco, in bond, shipment from Japan in May, 1919. Seller failed to make shipment in fulfillment of the contract, and on June 16th notified Buyer of the default. The measure of damages was a matter of dispute.

Held, That the measure of damages should be the difference between the original contract purchase price of $4.25 and the established market value of $5.25 for Manchurian Kotenashis on June 16th, date of the notification by Seller to Buyer of his default in shipment, which date we fix as the one upon which the prevailing market price shall be used in establishing the measure of damages. We, therefore, award $1.00 per hundred pounds on the shipment in question as the damages to be paid by Seller to Buyer. (San Francisco Chamber of Commerce Arbitration, 1919).

Affirmed on Appeal—Seller appealed from the foregoing award, the arbitrators on appeal saying:

"Buyer had the right of re-buying or settling within a reasonable time after notification of breach of contract by the Seller.

"A C. I. F. sale has absolutely nothing to do with the time of delivery of the goods; it merely refers to the time of shipment. We feel that the date the Seller notified Buyer should be the date of settlement, and in view of these facts we have arrived at the value of the goods by taking the market value on the date of the breach of contract." (San Francisco Chamber of Commerce Arbitration on Appeal, 1919).

Shipping Without Instructions—Seller Liable—Reconditioned Pepper Not Good Delivery—A, a San Francisco importer, sold to B, a New York merchant, 25 long tons Singapore **Black Pepper** to arrive per M/S "Jutlandia," from the Orient, for delivery F. O. B. cars on arrival at San Francisco. B subsequently sold the Pepper to C, a San Francisco merchant. Upon arrival of the cargo at San Francisco, A, without asking for instructions, shipped it by rail consigned to B at New York. Seller then notified Buyer of the shipment and then forwarded documents, whereupon Buyer telegraphed Seller that he did not want the car shipped to New York, having sold the pepper to C, at San Francisco, on the same terms as purchased from A, except that the price was one cent a pound higher. B insisted that he had never instructed the shipment to New York and demanded that Seller

tender the pepper at San Francisco. Seller replied that the car was then en route, but he would divert it elsewhere, and make delivery from another cargo ex dock. The pepper that was on the dock was reconditioned, and B declared that this was not a good delivery and that C would be justified in rejecting it.

Held, That Buyer is not required to take delivery under the terms of the contract in this case. We decide that no complete tender of delivery of pepper ex M/S "Jutlandia" was made by Seller in accordance with the terms of the contract, and as Seller was unable to tender full delivery from the vessel of the required quality of pepper Buyer is not obliged to accept the pepper offered by Seller.

In view of the fact that Buyer had sold the twenty-five (25) tons of pepper in question to C prior to the arrival of the "Jutlandia," on the same terms of contract as in the contract between the parties at interest in this case, except as to price, and the understanding was that Seller was to deliver the pepper to C, who would pay for same and remit to Buyer simply the difference of one cent per pound in the price to be paid by C to Buyer as per the contract between them, we find that Buyer had closed his transaction so far as he was concerned when he sold the pepper to C.

Inasmuch as Seller did not make delivery to C of pepper in accordance with the contract and as Buyer could not buy in the market other pepper and deliver to C, as his contract with C called for delivery of pepper ex "Jutlandia" and there was no other pepper than reconditioned pepper that could be tendered as delivery from that vessel, we find that Buyer through the default of Seller in this case was unable to carry out his contract with C and was damaged to the extent of the difference between his purchase price and his resale price.

We award to Buyer as damages the amount of Five Hundred and Sixty Dollars ($560) being the difference between his purchase price from Seller and his sale price to C of one cent per pound on twenty-five (25) long tons of pepper, which amount includes his expenses for brokerage paid by him on the resale to C.

We disallow the Buyer's claim for One Hundred and Twenty-five Dollars ($125) profit for C, which it is claimed C would have made if the pepper had been delivered to him in accordance with the contract, as C is not a party to this case and the only questions before us are:

(a) Whether Buyer must take delivery of twenty-five (25) tons of reconditioned pepper ex "Jutlandia".

(b) What damages, if any, he sustained through default in delivery by Seller of pepper as per contract. (San Francisco Chamber of Commerce Arbitration, 1918).

Shutting Out of Copra by Carrier or Default of Seller's Supplier Does Not Excuse Seller for Non-Shipment—Not a Contingency Beyond Seller's Control—Fixing Damages for Non-Delivery—Interest Not Allowed on Damages—A Portland, Oregon, importer sold to a New York crusher 500 long tons of Fair Merchantable Manila **Copra** in bags, for shipment from "Manila per steamer due to arrive at San Francisco January-February, 1918." The Copra was priced F. O. B. cars San Francisco.

No vessel was named in the contract nor did Seller subsequently name any vessel on which he expected to ship the Copra, although requested repeatedly to do so by Buyer between January 15, and February 14, 1918. On February 16th Seller advised Buyer that his suppliers had notified him that the Copra had been shut out of the S. S. "Kina," which had left Manila in November, 1917. Buyer insisted that the contract be fulfilled according to its terms, failing which he demanded damages in the sum of $14,840, being 1.32½ cents per pound on the contract quantity, together with interest at 6 per cent per annum from February 28th until paid.

Seller contended that under the contract he was only called upon to make delivery by shipment from Manila per steamer due to arrive at San Francisco January-February, 1918, and that he was not obligated to make San Francisco delivery, the term F. O. B. cars San Francisco, referring only to the price at which the Copra was sold. He claimed that the failure to make shipment from Manila was due to the default of his suppliers and he maintained that this default was beyond Seller's control and therefore he was relieved under such a clause of the contract.

Held, That under the contract delivery was to be made by "shipment from Manila per steamer due to arrive at San Francisco January-February, 1918" without any steamer being named. Seller therefore was responsible for furnishing Copra shipped from Manila by some steamer due to arrive January-February, 1918, and was not obliged to make delivery at San Francisco from local stock nor was Buyer obliged to accept such Copra, if it had been tendered, unless he choose to do so. The *price*, however, was F. O. B. cars San Francisco which included all charges until Copra was delivered on board cars at San Francisco.

The default upon the part of Seller, therefore, was in not shipping from Manila per some steamer *due to arrive* at San Francisco in January or February, 1918. The default was not failing to put the Copra on board cars at San Francisco on or before February 28th, for Seller was obliged to ship from Manila on time and not from San Francisco. If Seller had shipped from Manila on some steamer *due* to arrive at

San Francisco in February and the vessel did not actually arrive at San Francisco until after March 1st, Seller would have fulfilled his obligation so far as shipment was concerned.

The question, therefore, in this case is whether Seller defaulted in shipment for reasons beyond his control. The records of the San Francisco Chamber of Commerce show that a considerable number of vessels arrived at San Francisco from Manila in January and February, 1918. Seller stated that it was expected this Copra, or a portion of it, would be shipped on S. S. "Kina" which left Manila in November, 1917, and arrived at San Francisco December 15, 1917, and no satisfactory explanation is given in the testimony as to why such shipment was not made. It was the duty of Seller, under his contract, to see that space for this Copra was secured in advance on some vessel due to arrive January-February, 1918. If Seller's suppliers failed to make necessary engagements at Manila to ship on time, which Seller intimated was the case, that does not relieve Seller of his responsibility.

There is nothing in evidence to show that it was beyond Seller's control to secure space on some vessel leaving Manila in the required time, as he had from October 31, 1917, to January, 1918, to do this, and we decide that Seller is liable to Buyer for reasonable damages for default in shipment of the Copra in question, which damages we decide to be the difference between the contract price at which the Copra was sold to him and the market price in San Francisco at the end of February, 1918.

Having established the market price of Fair Merchantable Manila Copra in bags, F. O. B. cars Pacific Coast to be 9¼ cents per pound on February 28th, the last date of the contract period, Buyer is entitled to and is awarded the sum of $13,440, which is the difference between the contract price and the market price on the date of Seller's default. Buyer's claim for interest is disallowed for the reason that interest on damages is not justified unless it is shown that Buyer actually paid out money for Copra to take the place of that not shipped and that a higher price had been paid than that provided by the contract. No such showing was made by Buyer. (San Francisco Chamber of Commerce Arbitration, 1918).

Damages for Short Shipment of Rice Sold as "Now Rolling" —Seller Responsible—A San Francisco importer sold to a New Orleans merchant 688 bags of No. 1 Saigon Long **Rice,** F. O. B. Pacific Coast. It was specified that shipment was "now rolling". The New Orleans merchant, relying upon the statement that the shipment was

in transit, resold the rice to a purchaser in Cuba. Subsequently, it developed that 108 bags of the rice had been found to be damaged at Seattle, the point of shipment, and were not shipped on that account. The Seller notified his Buyer of the short shipment and requested that the delivery be considered complete without the 108 bags in question. The New Orleans merchant, however, was compelled to make a settlement with his purchaser in Cuba, paying the sum of $500 as damages for short shipment. Buyer demanded reimbursement of this sum, but the Seller contested the claim, contending that he had in good faith believed that the full quantity had been shipped at Seattle when the sale was made.

Held, That Seller having contracted to ship 688 bags of rice and having declared that this number of bags were then "rolling" in cars, was obligated to make full delivery or failing to do so, Buyer is entitled to reimbursement for the actual damage sustained because of the short shipment, in this case $500. (San Francisco Chamber of Commerce Arbitration, 1919).

Seller Liable for Non-Delivery of Coconut—Seller Having Bought All Available Supply in Coast Market, Buyer Could Not Purchase for His Account—A Pacific Coast importer sold to a San Francisco merchant 200 cases of **Coconut,** C. I. F., duty paid, Seattle. Seller did not fulfill the contract, and contended that he had definitely cancelled the contract because of the failure of his supplier in Colombo to ship. Buyer demanded damages for non-fulfillment.

Held, That Seller's telegram of May 19, 1919, to the broker in the transaction was not a cancellation of the contract, but was advice that Seller could not make shipment of the particular goods ordered from the original supplier in Colombo, and was in fact an admission of liability to deliver, Seller having offered $150 to Buyer to cancel the contract. That he did not consider the contract then cancelled is evidenced by the fact that he asked Buyer to name the best terms Buyer would accept for cancellation. We find nothing in that telegram to indicate that they did or would refuse to deliver other coconut if Buyer insisted upon delivery and refused cancellation.

Again, on May 23rd, Seller offered $300 to be released from his contract, thus plainly indicating he recognized the contract was still in force and that he was liable for delivery of the goods.

We feel that the letter of Buyer of May 21st to the broker is not an acknowledgment that his telegram of May 19th was notice that Seller was entirely unable to fulfill his contract, but was simply advice that Seller could not ship from his original suppliers as intended. This

is borne out by the notice given by Buyer in that letter that he *must, therefore, hold the Seller to his contract and will look forward to delivery of the stocks or other compensation in case of default.*

Again on May 26, 1919, Seller authorized Buyer to purchase coconut at 18½c per lb. to fulfill his contract, thus still recognizing his obligation to make delivery as Seller offered in the same telegram to buy spot goods in San Francisco and make delivery to Buyer's San Francisco house if Buyer could not purchase at 18½c in Seattle, and so requested.

We find no evidence of any formal and official notice by Seller that he could not and would not perform his contract until June 2, 1919, and he admits in his statement that he had in his possession at that time 170 cases of coconut which he had bought in San Francisco, not at 18½c but at 19½c on May 26th, to cover if Buyer was unable to purchase in Seattle at 18½c and should call upon him to make delivery to his San Francisco house as per Seller's offer. It was also admitted that in order to cover, Seller had bought up at 19½c practically all the coconut in the San Francisco market, so Buyer could not have purchased there if he had tried to do so at 18½c.

We decide in this case that Seller is liable for non-delivery as per contract. We decide that Buyer is entitled, as damages, to an allowance of the difference between the cost to him delivered at Seattle, duty paid, of the 200 cases of coconut, purchased to fill his contracts with his Buyer, and the cost of the original 200 cases C. I. F. Seattle, duty paid, had Seller fulfilled his contract, which amounts to $1,704.08 as per his claim, which is approved. (San Francisco Chamber of Commerce Arbitration, 1919).

Floods Interfering With Delivery of Rice Excuse Delay—"Extension of Time" Clause in Rice Contract—Where Market Declines Buyer Is Not Damaged by Non-Delivery—A San Francisco miller sold to a merchant in the same city 5,000 pockets of Fancy California Japan **Rice,** November shipment, F. O. B. cars San Francisco. Of this quantity 2,700 pockets were delivered November 30th, leaving 2,300 pockets to be delivered under the contract.

Seller claimed that he was prevented by floods in the district from which he intended shipping the rice from effecting delivery within contract time; that the floods followed heavy rains, inundating the fields and the highways to the warehouse near the river, and to the railroad, and that driftwood in the Sacramento River had interfered with navigation to such an extent that the river steamers were tied up. Seller further contended that rice of the grade called for in the contract

was not available in the market so he could not purchase the quality required.

Buyer claimed that he did not purchase any specific lot of rice, but he did buy rice of a certain grade, which was obtainable in the month of November and could have been purchased by the Seller to fulfill the contract. Buyer alleged that he had been damaged to the extent of $2,070, representing the difference between the price at which he had bought the rice and the price at which he had sold it to another merchant.

The Arbitrators said:

"The original contract entered into stipulated the quantity to be 5,000 bags, and the evidence indicated that 2,700 bags were delivered after the vendor's supplier had subscribed to due notice that, on account of flood conditions, that it had been impossible for him to move his paddy to the mill by team or truck to steamer or rail landing. Further, the barges had been unable to run alongside docks or warehouses in order to take off the rice, which conditions were due to a series of heavy torrential rains flooding the highways and fields, causing the river to rise rapidly.

"The vendor, under the contract, was obligated to make delivery during November and would be permitted an extension only on showing that he had been restrained and delayed from delivery by valuing upon the liability clause in the California Rice Association's Rail Contract, and by showing that he had properly disclosed the source of his supply and had not neglected or ignored the possibility of securing other stocks of like grade with which to make proper tender during the month of November.

"A careful review of correspondence and exhibits discloses that Seller had exercised due diligence in notifying the Buyer the source of supply applying to the contract and advised Buyer that delivery in all likelihood would be delayed on account of natural causes.

"The result of an investigation of warehouse stocks and brokers' offerings prove the endeavors of the vendor to obtain other rices of equal grade to have been unavailing on account of scarcity of stocks spot and being offered.

"In considering Buyer's contention that Seller was not entitled to value on the liability clause in the contract and secure relief by time allowance to make full delivery, it is the opinion and belief of the arbitrators that the Buyer's claim should have been set up as being the difference between the contract purchasing price and the sound market at the time Buyer was notified that delivery would be delayed. It is

obvious, therefore, that the claim advanced on the basis of the Buyer's resale price should not be used to fix the amount of Buyer's claim against Seller in this case. Therefore, stating a hypothetical case, in the event that stocks were available, Buyer should have stipulated with Seller as to the price necessary to afford him protection or actually buy to fill his contract during the period, in order to legally fix the amount of loss and damage sustained. In event that no stocks were available, other than the disclosed source of supply, it is equitable to presume that both the Buyer and the Seller should have agreed upon the extension of time necessary to complete the contract.

"All available statistics indicate that the market suffered a sharp decline during the last part of November. It becomes most apparent that under the ordinary procedure of establishing such claims, had the Buyer attempted to fill his order by actually buying and delivering rice during November, he would have been unable to show loss or set up any claim whatsoever.

Held, That in view of the foregoing circumstances, it is apparent that Buyer is claiming for an amount of anticipated or paper profit without due consideration to the customs of the trade or the ordinary legal method of establishing claims for loss or damage sustained, and it is our opinion and decision that this claim should be disallowed in justice to millers, members and dealers, who value on actual and substantial trading in rice, rather than on technical advantages secured through the exchange of contracts. (California Rice Association Arbitration No. 4, 1921).

Affirmed on Appeal—The Buyer appealed to the Appeals Committee of the San Francisco Chamber of Commerce, alleging error on the part of the original arbitrators.

Held, That the sale in question was not a sale of any specific lot of rice nor for the shipment from any particular point. Buyer submits in evidence that rice of the grade purchased was available in the market for Seller to buy and make delivery within the time of delivery. On the contrary the evidence submitted shows that no such rice was available for delivery, and the evidence shows that Seller made due effort to make such purchase in the market in November, Seller having asked for a few days' extension of time which, under the "Extension of Time" clause in the contract, he was entitled to, on account of being obstructed or delayed by causes beyond his reasonable control and such extension having been refused by Buyer, the claim of Buyer for $2,070 damages is disallowed, and the decision of the Arbitration Committee of the Rice Association of California is affirmed. (San Francisco Chamber of Commerce Arbitration on Appeal, 1921).

Failure to Submit Sample Until Too Late to Effect Delivery on Last Day of Contract—Seller Penalized for Default—A sold to B 500 pockets No. 1 California Japan Brown **Rice,** F. O. B. docks San Francisco, for shipment "November 24 to November 26th", subject to approval of sample to be submitted by Seller on or before November 23, 1920. The Seller did not submit the sample until November 26th, making it impossible to effect shipment that date, the last day for shipment under the contract.

Held, That Seller, not having fulfilled his obligation under the contract and No. 1 Brown Rice being procurable on the date of his default, Seller is penalized 15 cents per 100 pounds on 500 pockets of rice, this representing the difference between the sale price and the market price at date of default. (Rice Association of California Arbitration No. 5, 1921).

Failure of Ocean Transportation Does Not Cancel Contract—Seller, Without Cause, Cannot Rescind Unless Buyer Consents—Notice to Seller's Broker Insufficient—A Pacific Coast importer sold to an Eastern manufacturer approximately 50 long tons Fair Merchantable South Sea Sun-dried **Copra** in bags, shipment to be per steamer June or July, price 8⅛ cents per pound, net delivered weights, F. O. B. cars Pacific Coast. The contract was dated June 5, 1917, and was negotiated through a Chicago broker.

Seller purchased the copra from a supplier in Auckland, New Zealand, for shipment from Sydney to Vancouver. On June 28th the supplier cabled Seller he would be unable to ship the copra as the steamship company had cancelled all bookings for copra on account of danger from fire.

Seller claimed he immediately notified his broker, by letter on June 28th and asked him to advise Buyer, further particulars to follow when received. On August 8th, Seller notified the broker no definite advices had yet been received, but on November 7th he notified him that final reply had been received that the suppliers could not effect shipment and Seller asked broker to so notify Buyer and "have them wipe the slate clean of the matter", but there was no evidence that the broker carried out these instructions to notify Buyer of Seller's inability to ship.

Seller claimed he considered this failure of transportation *force majeure* or emergency beyond his control, as he claimed no other transportation was available, the steamship company being the only one carrying copra and operating between the ports mentioned at that time.

Seller claimed he considered the contract as cancelled as he heard nothing from Buyer until the following January, when in a letter of

January 8, 1918, Buyer notified Seller that on January 5th he had written to the broker regarding the non-delivery and on January 7th he had been advised that Seller claimed the copra was never shipped, and consequently he was not liable under the contract. That Buyer could not accept this as a good reason for non-delivery and he at that time demanded Seller to make tender and if not made he would have to buy in the open market against the contract and charge Seller with the difference between the market and the contract price.

Seller claimed that as the copra was sold for June–July shipment this would mean July–August arrival and that Buyer had no right to wait until the following January to advise Seller he expected delivery and that Buyer forfeited his right to claim by not making protest or claim on or about the time the copra should have arrived.

Buyer claims he never received notice from the broker of the delay or inability to deliver until about January 7, 1918, and was not obliged to make inquiry of Seller regarding delivery and that Buyer under the contract could ship copra from any locality by any steamer as long as the copra was of the designated grade and was shipped in June–July.

On March 18, 1918, Buyer notified Seller that he had bought in New York 50 tons mixed Macassar Copra in bags, that being the cheapest copra he could find approaching the quality Seller had sold him, and had paid for same 9½ cents in bags F. O. B. New York, making a difference of 72½c per 100 lbs. or $812 on 50 tons, above what the original copra, if delivered, would have cost at Philadelphia, and Buyer made claim for that amount, which claim was denied by Seller and referred to Arbitrators for adjustment.

Held, First—That Seller did not have the right to cancel the contract or consider the contract cancelled without the assent of Buyer, on account of being unable to ship by the steamship line upon which he expected to ship, as under the contract he could ship from any port in the South Seas and by any steamer from any such ports, as no vessel or port of shipment was named in the contract and Seller, when making the contract, took his chance of being able to ship from Sydney.

Second—That the broker was acting for Seller and as such he should have carried out Seller's instructions and notified Buyer upon receipt of Seller's letter of June 28, 1917, and again upon receipt of his letter of November 7th, and a definite understanding of Buyer's willingness to cancel or otherwise should have been had by him, but we further find that Seller should have notified Buyer direct and obtained an answer from him as to whether he accepted cancellation or not. Seller had no right to assume that Buyer accepted cancellation without advices from him to that effect.

Third—That Buyer should not have waited until January, 1918, before making inquiry as to whether the copra had been shipped or loaded on cars at Coast. This was not a C. I. F. sale, but was F. O. B. cars at Coast. As shipment was to be by steamer June–July, Buyer had the right to expect delivery at Coast at least by October and would expect to receive in October documents and notice of loading at Coast and by what railroad shipped.

Buyer knew on about January 20, 1918, from Seller's letter of January 15th, that Seller had not shipped, and could not ship, and could not make a tender under the contract and the evidence shows that Buyer still waited nearly two months before buying copra on the market against the contract, although he had notified Seller on January 8th that failing to receive tender he would buy copra on the market against the contract and would charge Seller with any difference in price over the contract price. This it was his duty to do, but he failed to act upon it until about March 18th.

We find that Buyer should have made inquiry of Seller in December, 1917, at the latest, as we consider that 60 days from last shipment date was the longest time that should be allowed in normal times for delivery at Coast, but due to unusual conditions existing at that period we believe not more than four months from July 31, 1917, the last date of shipment, to be reasonable time to allow for delivery of the shipment in question, which would mean December delivery at coast.

We, therefore, think it was Buyer's duty to make inquiry regarding this shipment within at least four months after July 31st, whereupon he would doubtless have been informed that shipment had not been made and it would then have been his privilege and duty to buy in open market against the contract. It will be noted that it was not until November that Seller had final notice that the copra had not been shipped and in that month notified the broker and asked to have contract cancelled by Buyer.

We decide that any allowance by Seller on account of non-delivery should be based upon the market price of the copra in question at the Pacific Coast in December, 1917, and we find that a fair market price for said copra in bags at the Coast in December to be 8¾ cents.

We decide that Seller shall allow and pay to Buyer as damages for non-delivery, the difference between said December market price at Coast, 8¾ cents, and the contract price at Coast, 8⅛ cents, or 62½ cents per 100 pounds on the 50 tons sold, amounting to $700, and that said payment shall constitute full settlement of the claim in this case. (San Francisco Chamber of Commerce Arbitration, 1921).

Failure of Supplier to Deliver Barley Does Not Excuse Seller —Buyer Entitled to Damages—Operation of Rule Governing Prompt or Future Shipments—A sold to B about 10,000 sacks of Barley delivered at Port Costa, California, immediate shipment from San Miguel, quality to be like sample. The contract was made June 29, 1914. Various deliveries were made against the contract, the aggregate deliveries being 8,000 sacks to August 22, 1914. September 1st, Seller notified Buyer that no more grain would be delivered on the sale, his supplier having stated that no more deliveries would be made. Buyer refused to accept the notice from Seller and claimed that the balance of 2,000 sacks should be delivered. As this balance had not been delivered, Buyer notified the Seller on the 25th of September that he would hold him to deliver the balance, or to settle at the market difference. No more grain being delivered, Buyer fixed the difference between the market value and the price at which the barley was purchased at 10c per cental.

The Seller claimed that Buyer did not exercise his option of claiming a difference on account of non-delivery within the time as contemplated by the rules of the Grain Trade Association.

Held, That Section 3 of Rule VI reads as follows:

> "On sales of grain to arrive or for prompt or future shipments, it shall distinctly be specified within what number of days from the date of sale the grain is to be shipped, to arrive or be ready for delivery."

No time as contemplated by this section was stated in the memorandum of sale. Had it been the intention of the Seller that the grain should be delivered within any specified time, it was his duty to so state on the memorandum of sale. The committee on grain decides that Buyer is entitled to the difference in price, namely 10c per cental, on the balance of the grain undelivered, said to be 2,000 sacks. (San Francisco Chamber of Commerce Arbitration, 1914).

Verbal Agreement Governs When Seller Remains Silent Upon Receipt of Written Notice of Buyer's Understanding—Prices Subject to Subsequent Opening Prices—A California merchant sold to a Chicago dealer a quantity of **Almonds** ex warehouse, Chicago, at stated prices, and verbally guaranteed that the prices would be three cents per pound less than the opening price for the season of 1920. The facts of the case were that the Buyer had been given an option about May 28th on a certain quantity of goods. On June 2nd the Buyer exercised his option as to a certain portion of the goods subject to

inspection, and did not purchase other lots under option. On June 16th Buyer wrote to Seller, saying in part:

> *Kindly confirm your verbal agreement guaranteeing this purchase price will be at least three cents per pound less than that named for* 1920 *crop.*

No answer was made by Seller to this letter. Subsequently, prices for 1920 crop almonds were named and were not uniformly three cents per pound higher than the price at which the nuts in question were sold, whereupon the Buyer made claim for $1,110.80, which he claimed was the difference between the sales price and the opening price for new crop goods. Seller contended that he did not make a guarantee as to prices being three cents a pound lower than the opening price as new crop nuts, but had remarked casually that he would do so if the Buyer exercised his option on *all* the nuts offered. Seller maintained that Buyer never accepted the offer, but instead selected only a portion of the lot, and that it was absurd to claim that the offer of a price guarantee applied on any portion of the lot when it was the clear intent to make it applicable only to all the nuts under option.

Held, That Buyer did, on June 16th, ask for a written confirmation of this purchase and the application to it of the verbal agreement previously referred to, which request was ignored by Seller. In the opinion of the arbitrators, this request on the part of the Buyer, indicating as it did his belief that the purchase was subject to the agreement, should have received prompt attention by the Seller, and that in the absence at that time of any denial, is to be construed as tacit consent on the part of the Seller that the terms referred to were to apply to the purchase. The contention of the Buyer having been made clear in his letter of June 16th, Seller was again remiss in not disclaiming the agreement in connection with the sale on June 29th of twenty-six bags of nuts. Buyer is entitled to reimbursement in the sum of $1,110.80, representing the difference between the purchase price and the opening price for new crop nuts. (Dried Fruit Association Arbitration No. 1, 1921).

Damages for Resale

In general, under the rules of various associations, a Seller is not justified in diverting and reselling goods over which a dispute has arisen when a contract calls for arbitration and the other party is willing to arbitrate his differences.

Diversion and Resale of Goods Not Justifiable When Arbitration of Dispute Is Requested—Buyer Has Right of Settlement by Arbitration—A, a California packer of dried fruits, sold to B, a New York merchant, a quantity of **Prunes** under the Uniform Dried Fruit Water Contract. When the Buyer received Seller's contract he objected to certain provisions therein, and Seller wrote to his New York representative that he had deleted the objectionable part of the contract and that he was "returning same duly signed". When the draft was presented to Buyer he declined to honor it on the ground that the inspection certificate did not cover what he claimed was an important contract requirement, viz.: the words *highly processed for water shipment.*

When the contract was presented to the arbitrators it was not altered in any way, notwithstanding Seller's statement, above noted, that he had made the alteration therein. On this point the arbitrators said:

"It is assumed that Seller agreed to same, for had he not been willing to do so, he had opportunity to advise the steamship company to delay shipment until he could straighten out the matter with his Buyer or his brokers, or to have instructed the Dried Fruit Association of California to embody this requirement in the application for inspection, thereby making it a condition precedent to the issuance of certificate of quality".

When Buyer refused to honor the draft, Seller immediately diverted the shipment and attempted to cancel the contract. Buyer objected, demanding damages for Seller's unwarranted diversion and resale, on the ground that the contract called for the settlement of any disputes by arbitration and asserting his willingness to submit the matter to arbitrators.

Held, That as the Uniform Dried Fruit Contracts, both Water and Rail, call for arbitration in case of any disagreement, Seller had no right to divert and dispose of the goods without Buyer's consent. Therefore, Seller is directed to pay Buyer the difference between the sale price, F. O. B. San Francisco, and the market value of the goods at time of arrival of same at New York, representing the value thereof to Buyer on that date. (Dried Fruit Association of California Arbitration No. 140, 1913).

Declaration of Vessel

The Foreign Commerce Association of the Pacific Coast has two rules covering "Declaration of Vessel"; Rule No. 11 applying to general commodities and Rule No. 261 (identical with Rule 7, Section 1, New York Produce Exchange) applying to Vegetable Oils. Rule 11 reads as follows:

> "If a shipment or part thereof be lost, such contract shall be void for the portion lost if name of vessel has been declared by Seller and satisfactory proof of shipment from abroad has been submitted to Buyer. If a shipment or part of same is lost before Seller has, through delay in cables or mails or from other causes beyond his control, received advance advice of shipment, Seller shall be relieved from making declaration as regards that portion of the contract. If after having been named vessel is lost before reaching loading port, contract shall be void for the goods to have been shipped in the vessel named."

Foreign Commerce Association Rule No. 261 (New York Produce Exchange Rule 7, Section 1), reads as follows:

> "When contracts stipulate that shipments are to be made from foreign countries or American colonies, declarations shall be made by Seller within 48 hours of receipt of mail or cable advices of shipment. If in execution of any contract, a shipment or part thereof be lost, such contract shall be void for the portion lost, if name of vessel has been declared by Seller and satisfactory proof of shipment been submitted to the Buyer. If a shipment or part of same is lost before the Seller of a shipment from foreign countries or American colonies has, through delay in the mail or from other causes beyond his control, failed to receive advance advice of shipment, the declaration shall be waived by the Buyer as regards that portion of the contract as may have been lost; provided that Seller must bring satisfactory proof of the facts. Should vessel arrive before declaration has been made and extra expense been incurred through these circumstances, such expenses are to be borne by the Seller."

Rule No. 262 is as follows:

> If Seller fails to declare the foreign shipment (of Vegetable Oil) 45 days after the stipulated contract period, it shall be

considered as non-compliance with contract. (Foreign Commerce Association Rule 262, New York Produce Exchange, Rule 7, Section 3).

Declaration Not Obligatory—The general rule is that declaration of name of vessel is not obligatory upon Seller in the absence of a specific agreement.

Where the contract does not so provide no obligation rests upon Seller to declare to Buyer date of shipment or name of vessel prior to tender. (Importers and Exporters Association Arbitration No. 5, 1919).

Declaration, Once Made, Cannot Be Withdrawn—But where a declaration has been made Seller cannot withdraw same or substitute, without Buyer's consent.

Declaration in "Full Cargo" Sales—A declaration is not of necessity incumbent upon Seller on Full Cargo sales, as the cargo of an unidentified vessel might be sold in any position. But if the vessel has been named, the declaration cannot be changed without Buyer's consent.

Rejection of documents under a C. I. F. sale of **Rice** on the ground that Buyer had declared one vessel and thereafter presented documents covering another vessel and, further, that the delivering carrier was routed via the Suez Canal, was not sustained. Where there was a conflict in the evidence as to the finality of the first declaration, arbitrators resorted to the contract itself. (Rice Association of California Arbitration No. 9, 1920, Page 99).

Where a Seller seeks release from a contract under the operation of *force majeure* he must have declared the vessel to the Buyer, failing which he will not be excused for non-delivery. (San Francisco Chamber of Commerce Arbitration, 1920, Page 98).

Failure to Declare Vessel—Goods Lost at Sea—Seller Must Complete Contracts—Identification of Goods—A Pacific Coast importer sold a quantity of Green **Coffee** to another importer, under two contracts, each containing the following printed clause: *No arrival, no sale, in case of coffee actually shipped but lost in transit.*

The Seller claimed that a portion of the coffee intended to apply on the Buyer's contracts was shipped per the S. S. "San Mateo", and that this vessel being lost, he was thereby released from his obligation to make delivery as to that amount of the coffee. Buyer claimed that the identification of the lost coffee was incomplete, so far as his contract was concerned, and he was entitled to full delivery.

Held, That in this case there was no positive identification of the particular lot of coffee that was to be delivered to Buyer as being the particular coffee that went down on the S. S. "San Mateo." Furthermore, this was to be a tender of delivery at San Francisco and no vessel was named during the life of these contracts, by Seller to Buyer, prior to the loss of the S. S. "San Mateo", and unless so named Buyer was not interested in the loss of the "San Mateo." (San Francisco Chamber of Commerce Arbitration, 1920).

Affirmed on Appeal—This matter went to Appeal, Seller submitting an affidavit that he intended to apply the coffee shipped per S. S. "San Mateo" to the Buyer's contract.

Held, That Seller cannot claim protection under the clause *No arrival, no sale in case of coffee actually shipped but lost in transit* unless the vessel carrying the goods is named to Buyer prior to her loss. (San Francisco Chamber of Commerce Arbitration Appeal, 1920).

Where Evidence as to Declaration of Vessel Conflicts, Arbitrators Will Resort to Contract—Under C. I. F. Terms Any Shipping Route May Be Taken If Not Otherwise Specified—A, a Pacific Coast importer, sold B, a San Francisco merchant, a quantity of No. 1 Saigon Long **Rice,** C. I. F. Havana, Cuba, January-February shipment from Hongkong. February 17th Buyer asked the Seller to declare the name of steamer and date of shipment, the Seller, in turn, asking his supplier for the information. April 5th Buyer wrote Seller that it was imperatively necessary that he have immediate advice as to shipment, and Seller replied as follows: *Our supplier has notified us that this Rice is afloat on the S. S. "Toyo Maru," which sailed late in February from the Orient.* April 27th Seller informed Buyer that his supplier advised that the rice had been shipped per the S. S. "Hague Maru".

Buyer refused to accept the documents on presentation, claiming that the Seller, having declared the steamer, could not thereafter tender goods carried by another vessel, except with Buyer's consent, or if due to *force majeure,* compelling the transfer of the goods from the declared vessel to another, which the Seller had not urged as a reason for the substitution. Buyer also contended that the delivering carrier was routed via the Suez Canal, thereby causing delay in receipt of goods. Seller claimed that under date of April 9th he had written Buyer that the advice of the 5th had been received by telephone and was subject to correction, and that on the 10th he had declared the S. S. "Hague Maru". Seller denied having received either communication.

Held, That the evidence submitted, in the form of affidavits, being contradictory, it is necessary for the arbitrators to fall back upon the terms of the contract. This was a C. I. F. sale, and as the contract does not provide for shipment via any route or vessel, documents conforming strictly to the terms of the contract are a proper tender thereunder, and Buyer shall accept delivery. (Rice Association of California Arbitration No. 9, 1920).

No Obligation on Seller to Declare Vessel—Seller Not Required to Make Direct Purchase From Abroad—Kind of Container Specified Must Be Supplied—A and B contracted under date of July 23, 1919, for one hundred tons of **Soya Bean Oil,** August shipment from the Orient, San Francisco delivery, ex dock Breck Mitchell, Inc., plant, San Francisco, net cash upon receipt of documents. The contract also bore the following notations: *"Barrels to be recoopered and put in first class salable condition after arrival in San Francisco"*; *"Public Weigher's Certificate to govern after recooperage of barrels"*. *"Fir and oak barrels mixed."*

August shipment from the Orient was specified and shipment was made on or about August 11th, from the Orient. On August 29, 1919, Buyer requested Seller to declare date of bill of lading. Seller, however, did not then or subsequently name date of shipment or vessel. On or about September 8th, the oil having arrived at Seattle, Seller, apparently without then naming importing steamer to Buyer, informed Buyer of the arrival of the oil at Seattle, and Buyer at that time took up with Seller the question of an allowance in price if Buyer would accept shipment at Seattle instead of San Francisco. Buyer finally decided to allow shipment to come forward to San Francisco.

Buyer refused to accept tender at Breck-Mitchell Inc., plant, San Francisco, on October 6, 1919, and sought to have his rejection sustained by arbitration on the following specific grounds:

First. Because the oil was never purchased by Seller in the Orient.

Second. Because the Seller refused and neglected within a reasonable time, in accordance with the custom of the trade, to name the vessel and date of shipment to Buyer.

Third. Because the delivery was not tendered in mixed fir and oak barrels.

While the Buyer did not base his rejection thereon, he mentioned that the delivery order was tendered without weight certificate and invoice although the contract specified "Payment net cash upon receipt of documents."

Buyer did not contend that the oil was not shipped from the Orient during August, but did hold that the Seller did not purchase it in the Orient and that the steamer's manifest did not show Seller as a consignee.

Held, First. That Seller in good faith purchased this oil for August shipment from the Orient and it was so shipped. There was nothing in the contract preventing the Seller from buying this oil from Pacific Coast Sellers, so long as the oil was August shipment oil.

Second. That no obligation either under the contract or by custom of trade rested upon Seller to declare to Buyer date of shipment, or name of steamer prior to tender of the oil.

Third. That Seller's failure to tender in mixed fir and oak barrels would not justify a rejection of the goods. Buyer would be entitled to require Seller to recooper into oak barrels approximately 50 per cent of the oil, or Buyer could require an allowance on all fir barrels over 50 per cent of the number of barrels delivered, such allowance to represent the market difference in value between Soya Bean Oil in oak barrels and Soya Bean Oil in fir barrels.

Fourth. That while Buyer does not claim that failure to tender weight certificate and invoice is ground for rejection, arbitrators feel that since Buyer has raised this point in an indirect way, arbitrators should and do hereby find that the tender of a delivery order is a good tender, as neither the weight certificate nor the invoice would be prepared in the ordinary course of trade until the oil was weighed and delivered.

Fifth. That Buyer is bound to take delivery of shipment in accordance with contract terms. Furthermore the Buyer shall pay all the expenses of storage, insurance, and interest or other loss the seller may have been put to as the result of the Buyers not accepting delivery when tender was made. (Foreign Commerce Association Abritation No. 5, 1919.)

Delivery, Time of

Reasonable Time of Delivery Implied—The general rule as to sales of merchandise is that where no time of delivery is specified delivery must be within a reasonable time.

The general rule is that exception as to quality of goods delivered must be made at the time of delivery and not after acceptance and removal of the goods from the place where inspection should have been made.

Effect of Force Majeure—Where delay has resulted from mishap to vessel, or other causes beyond Seller's control, rejection for delay in delivery will not be sustained under a contract containing what is commonly described as a "casualty" clause. (Importers and Exporters Association Arbitration No. 1, 1918, Page 105; Importers and Exporters Association Arbitration No. 6, 1919, Page 106).

Under a C. I. F. Seattle contract Buyer actually took delivery of a quantity of **Peanuts** and caused them to be removed from the dock, subsequently objecting to the quality. Buyer's action in taking delivery without protest was in itself an acceptance. (Foreign Commerce Association Arbitration No. 14, 1920, Page 193).

Delay in delivery of imported **Beans** when requested or acquiesced in by Buyer at time of original tender will not warrant a rejection, notwithstanding that delivery was not effected until October 25, 1918, although goods had arrived at Seattle April 3, 1918. (California Bean Dealers Association Arbitration No. 17, 1918, Page 103).

When Delivery Is Delayed by Buyer's Request—A sold to B a quantity of **Maruzura Beans,** C. I. F. Seattle and/or San Francisco delivery, in bond, the contract being dated November 30, 1917. Fifteen hundred (1,500) bags of beans applying on this contract arrived in Seattle on the "Borneo Maru" some time just prior to April 3, 1918. On or about May 2, 1918, Seller transmitted to Buyer two (2) delivery orders on his Seattle branch numbered, respectively,157 for 1,000 bags, 158 for 500 bags.

These orders were transmitted by the Buyer to the Seller's Seattle house with instructions to deliver to another company the one thousand (1,000) bags, and requested Seller to hold the five hundred (500) bags covered by order No. 158 for Buyer's account, and advise as to where stored. It may be noted that prior to this time, on or about April 4th, Buyer had requested that samples of these

beans be sent to the San Francisco Chamber of Commerce, which was done; it also appears that owing to general freight congestion at Seattle, the goods were not moved to storage until June 4th. Between the time that Buyer sent his delivery orders and his letter to the Seattle office of Seller, dated July 3rd, there was certain correspondence relative to weight certificate, but there appears no record of any anxiety on the part of Buyer in connection with the five hundred (500) bags represented by order No. 158. On the contrary, in his letter dated July 3rd, Buyer said: "We are in no hurry for the other five hundred (500) bags, and will give you shipping instructions later."

The question to be determined was whether Seller made a good delivery of the five hundred (500) bags paid for by Buyer, which Buyer charged back to Seller, claiming that no proper delivery was made, and the conclusions of the arbitrators thereon were as follows:

"That at the time that Seller gave the two delivery orders on its Seattle house for fifteen hundred (1,500) bags, as per Buyer's instructions, and Buyer accepted these orders, sent them to Seattle, and requested the Seattle house to ship the one thousand (1,000) bags to another company, and to hold the other five hundred (500) bags in the same relative position as the one thousand (1,000) bags upon which delivery was made in accordance with the instructions. It also appears from the telegram sent by Buyer to Seller at Seattle, under date of July 31st, reading as follows:

"Referring weight certificate July 13th beans marked G ten T from yourselves two hundred twenty-six sacks, one hundred fifty-nine sacks, one hundred twenty sacks, total five hundred five ex 'Borneo Maru'; wire quick disposition if not shipped, what warehouse stored," and Seller's reply under date of August 1, 1918:

"Your wire yesterday five hundred five sacks beans G ten T in Winn and Russell warehouse,"

clearly indicated from Seller's use of the words "if not shipped" that he had lost track, during the intermediate period, of these beans; also that nothing further was said or done about them for nearly three months, when Buyer, in his letter dated October 25, 1918, addressed Seller at San Francisco, saying in part "in endeavoring to obtain negotiable warehouse receipt for these five hundred (500) bags of beans we find that they are not held for our account. We call your attention to telegram received from warehousemen, dated August 16th, as follows:

' "Have no record of five hundred five bags of beans marked G ten T in your name.'

"From the foregoing it would appear that, after receiving word, under date of August 1st, that the beans were stored in warehouse, Buyer paid no further attention thereto until about October 16th, and the arbitrators feel that Buyer did not show due diligence in the matter, in view of the fact that he had accepted an order on the Seattle house for the five hundred (500) sacks, turned the order over to the Seattle house, with instructions to hold the same for his account, paid for the goods, and then failed, for a period of nearly three months, to follow up the transaction and obtain his negotiable warehouse receipt, which could have been delivered by Seller at any time during this period. On certain other contentions set up by Buyer, particularly on the point that, although the contract is ostensibly a C. I. F. contract, no documents or insurance policy were delivered, the arbitrators find that the contract specifically states that terms are cash against delivery order. Deliveries were tendered by Buyer to Seller. and acceptance of same was signified by the payment of invoice covering quantity of beans involved. This completed the transaction as far as Seller was concerned.

"Should the Buyer have encountered any difficulty in securing the delivery of the beans covered by these delivery orders, arbitrators consider that immediate demands should have been made direct to Seller.

"Referring to Buyer's claim that no specific delivery was made of the five hundred five (505) sacks at any time during the controversy, it will be noted that contract reads *Seller has the option of delivering 5 per cent more or less* and considering these features in conjunction with the conditions at Seattle, it is deemed that the strength of this claim is entirely eliminated.

"Whatever responsibility Seller assumed after acceptance by Buyer of the delivery order for the five hundred five (505) sacks and its re-delivery to the Seattle house, was a matter of accommodation and not a part of the original transaction. The arbitrators are unanimous in feeling that the Buyer did not show due diligence in obtaining the negotiable warehouse receipt from the Seller, and, therefore, the delivery being a good delivery under the contract, Buyer is not entitled to a return of his purchase price. (California Bean Dealers Association Arbitration No. 17, 1918).

Notice of Arrival Customary but Failure to Give Is Not Ground for Rejection—A, Seller, and B, Buyer, contracted for one hundred (100) tons Chinese ungraded **Peanuts,** ex dock Pacific Coast Port, subject to inspection and acceptance on arrival, shipment from

the Orient during April-May-June. Buyer rejected, claiming that Seller did not give notice of arrival of the goods at Seattle until several weeks had passed. Seller contended that he did notify Buyer as soon as the goods were cleared and ready for inspection.

Held, Although the arbitrators do not exonerate Seller of his failure to promptly notify Buyer, as they firmly believe it is a trade custom to notify the Buyer of the arrival of goods and any difficulty in clearing, they nevertheless feel that the contract is still in force and that the Buyer shall make immediate examination of the goods and if in his opinion the quality is up to contract requirements he shall accept same, otherwise the question of quality shall be referred to arbitration. (Importers and Exporters Association Arbitration No. 1, 1918).

Force Majeure Affecting Time of Delivery—Rejection After Acceptance—A contracted with B and B with C for the sale and purchase of four hundred (400) tons Japanese and/or Korean Kotenashi **Beans,** H. P., F. A. Q. Season of 1918, in bond, ex wharf Pacific Coast, July-August shipment from the Orient. Deliveries of three hundred thirty (330) tons were effected against the contracts, the remainder, seventy (70) tons, being refused by B and by C alleging delivery was delayed unduly.

Tender of delivery order covering seventy (70) tons (the remainder of the quantity) was made to B on September 10, 1919, which order was returned to Seller with the request that B be furnished with certificate of inspection and samples of the goods. The contract called for payment *net cash in exchange for delivery order,* and there is no mention of a certificate of inspection nor was Seller obliged to furnish sample of goods. Nevertheless, Seller did undertake to obtain such certificate and samples, and on October 25, 1919, did tender these documents, having been delayed in fulfilling B's request by reason of the fact that the "Shinbu Maru," on which the goods arrived at Seattle, had run aground, had been towed to port, her cargo discharged in a disorderly manner and after discharge was under the control of surveyors. Clause 4 of the contract provided: *Delay in time of shipment or delivery caused by * * * perils of the sea, or any other cause beyond the control of the Seller, does not constitute cause for rejection of goods by Buyer.* Also, there arose other contingencies beyond Seller's control.

Held, That Seller A made shipment from the Orient well within contract period, and that he tendered delivery order as soon as practically possible, i. e., September 10, 1919, and that Buyer B, for a period

exceeding one month, accepted this tender in fulfillment of contract, and that Buyer B should take delivery.

As to the dispute between B and C, the conditions were identical and the contracts were the same except as to the payment clause, which indicated to the arbitrators that C did not desire early shipment from the Orient, as September 15, 1919, is provided as the earliest payment date.

Held, That B made shipment from the Orient well within contract period and while delivery may have been delayed owing to mishap to vessel, such contingency was specifically covered in the contract. Tender was not thereafter unduly delayed and all the material conditions of the contract were fulfilled. C was directed to take delivery of the goods. (Importers and Exporters Association Arbitration No. 6, 1918. Affirmed on Appeal, Importers and Exporters Association Arbitration No. 6A, 1918).

Demurrage

Shortage in rail equipment whereby a charterer is prevented from unloading the cargo on cars will not relieve charterer of responsibility for demurrage on vessel. (San Francisco Chamber of Commerce Arbitration, 1920, Page 222).

Presence of Ice Preventing Movement of Barge with Lumber for Vessel's Cargo—A Contingency Beyond Shipper's Control—Necessity to Trim Vessel—The owner of a vessel claimed demurrage in the sum of $3478 with interest, for delay of the vessel while loading a cargo of lumber at Pacific ports, the Owner contending that the delay was due to the Shipper.

It was not shown that there was a lack of lumber for the vessel at any of the loading ports, except at St. Helens, where the lumber intended for No. 5 hatch of the vessel was not alongside, but it was in evidence that this lumber was cut and loaded on a barge to be placed alongside No. 5 hatch but was prevented by ice, due to the cold snap, from moving to the loading point, and the Arbitrators considered this condition clearly beyond the control of the Shipper.

It was not shown that the vessel was in a condition, under prevailing weather conditions, to load an average of 300,000 feet per day. This was further evidenced by the fact that at the Hammond Mill, the last loading port, where more lumber was ready at the dock than could be loaded, and where no sorting of lumber was required, the vessel did not load the required 300,000 feet per day, except on two days, even when loading on deck.

While the sorting of lumber at Knappton Mill would require some extra handling, the Arbitrators expressed the opinion that this caused any appreciable delay in loading, when the amount loaded there per gang is compared with the amount loaded at other points where no sorting was required.

It was shown that the capacity of the vessel was over-estimated by its Owners and that at the last loading port it was necessary to reduce the number of gangs and slow down the loading in order to bring vessel to trim.

Held, That Shipper is not liable for demurrage claimed by the Owner. (San Francisco Chamber of Commerce Arbitration, 1921.)

Demurrage for Non-Completion of Vessel in Contract Time —Excusable Delay—Necessity of Clearance Papers from U. S. Shipping Board—A Norway shipowner contracted with an American shipbuilder to construct a steel freight steamer. The contract provided that the vessel was to be completed and delivered to the owner's agents on or before February 20, 1917, and if not delivered on or before that date, or within the period to which the time for delivery may be extended under certain provisions of the contract, for each day the time was exceeded until the completion and delivery of said steamer, the builder should pay a penalty of $1,000 to the owner, and for every day the vessel shall be completed and delivered before said date or any permissible extensions thereof, the owner should pay the builder the sum of $1,000 as a premium, provided that said premiums should not be for more than 30 days if extensions of time for delivery in the aggregate should exceed thirty days.

Delivery of the vessel was made upon March 22, 1917, although it was in evidence that delivery was tendered by builder upon March 16, 1917, upon payment by owner of balance due, and owner claimed thirty days demurrage at $1,000 per day under the terms of the contract, as liquidated damages for delay in delivery.

The builder denied owner's claim for any damages on the grounds of excusable and permissible delay in the construction of the vessel, amounting, as claimed, to more than the delay in delivery.

It was in evidence that four days' delay was caused by a strike at builder's plant and that due notice thereof was given by builder to owner. The arbitrators found that builder was thereby entitled to four days' extension of time for delivery, under the terms of the contract, thus making the then delivery date February 24, 1917.

It was in evidence that the seven days' delay upon the part of the owner in making final payment and taking delivery upon March 16, 1917, when builder notified owner's agents that vessel would be ready for delivery March 16th, was due to delay in securing from the United States Shipping Board the necessary clearance papers, and it was admitted that this seven days' delay was beyond the control of either party. The arbitrators decided that the actual date of delivery to which any penalty for delay should be reckoned was March 16, 1917, and as the contract delivery time was extended to February 24th, on account of strike, this left 19 days actual delay in delivery of the vessel to be considered in connection with owner's claim for demurrage. The arbitrators, in discussing the matter, said:

"We have given very careful consideration to the statements and other documents submitted by both parties in this case and have taken more time than usual in studying and weighing the details of the evidence submitted in connection with claims made for and against excusable and permissible delays upon the part of the builder and whether such delay or part thereof was actually beyond builders' control.

"The committee has taken into consideration the fact that at the time of the builder's entry into the contract with the owner on August 23, 1916, he had thorough knowledge of the serious delay already occasioned at that time, amounting to more than a quarter of a year, in the shipment of the plates from the mills.

"We believe it was his duty to have imparted this knowledge to the owner, so that he might have the privilege of entering into the contract or declining to do so, as it is possible that this would have influenced him, and at any rate he was entitled to know the full status of the case at the time the contract was entered into.

"To emphasize this further, and showing that the builder himself was disturbed by the great delay occasioned up to that time on August 23, 1916, being the very day on which the contract was signed, he telegraphed to his representative in the East, calling attention to the serious delay in the shipment of plates from the mills and asking him to call the matter to the attention of the Steel Mill and ask its assistance in solving the difficulty. We also take into consideration the fact that as testified by the builder's representative, and also by letters in evidence, the delay in shipment of the plates was partly occasioned by the Steel Mill having oversold its output. The oversold condition of any merchandise could not by any stretch of the imagination be considered a cause beyond the control of the Seller.

"The committee, however, finds that subsequent to August 23, 1916, the builder used every diligence and made every effort to expedite the shipment of the plates and went even further by substituting for this vessel, plates intended for sister ships which had been planned and whose plates had been ordered previously.

"Under these circumstances, while they consider the builder is responsible for any delays prior to August 23, 1916, the committee does consider that they could only render substantial justice by relieving the builder of any delays subsequent to that delay believing that it was entirely beyond his control. Therefore, it remains only for the committee to find the measure of damages and we fix said damages at the

sum of $7,600 and we decide that the builder shall pay to the owner as liquidated damages for demurrage the sum of $7,600, and that said payment when made shall constitute full settlement of all claims in this case.

"The committee has considered the point made by the builder that he was entitled to an extension by reason of the delay in certain partial payments according to the contract, but we find that as shown by the evidence placed before us the builder was not delayed in the construction of the vessel nor in any other way injured by those delays and do not consider, under the wording of the contract, that the builder is entitled to any allowance of time on account of said delays. (San Francisco Chamber of Commerce Arbitration, 1920).

Diversion

The general rule on F. O. B. cars Pacific Coast contracts is that the Buyer has the right of diversion.

On sales made F. O. B. cars Port of Entry, Seller has option of selecting initial line (except in case of Buyer's tank cars), but shall, when possible, recognize routing named by Buyer. When goods are sold delivered, Seller shall have option of selecting entire route. When goods are sold F. O. B. Port of Entry for trans-shipment by all-rail, rail and water or all-water, and after arrival at Port of Entry it be impossible to observe Buyer's routing instructions by reason or inability of railroad to furnish equipment, or if shipment is refused by carrier on account of strike, railroad embargo or governmental regulations or inability to obtain vessel space, Seller shall notify Buyer, and in the absence of immediate instructions to ship by another open route, or to store goods for Buyer's account, Seller shall be privileged to ship by any open route at equivalent freight rate. (Foreign Commerce Association Rule No. 22).

Termination of Sellers Responsibility—The general rule is that, notwithstanding shipped to Seller's order, goods sold F. O. B. cars or F. O. B. vessel for transhipment from Port of Entry, or F. O. B. vessel from domestic port, are at risk of Buyer from and after delivery to carrier and upon issuance by carrier of bill of lading or shipping receipt. (Foreign Commerce Association Rule No. 26; Dried Fruit Association of California, Canners League of California and California Bean Dealers Association Uniform Contract Provisions).

When Buyer requests Seller to divert shipments, or to perform other accommodations not provided for in contract, Seller shall not be responsible for any error made in carrying out Buyer's instructions. In undertaking such accommodations for account of Buyer, Seller is merely acting as agent without compromising Seller's rights under contract. Seller shall be privileged to make delivery by presentation of exchange bill of lading provided same shows that original bill of lading was dated within contract time. (Foreign Commerce Association Rule No. 27).

If Buyer delays his request for diversion beyond the time when it may be attempted or effected by Seller using due diligence, Seller cannot be expected to perform the impossible. (Foreign Commerce Association Arbitration No. 25, 1920, Page 52).

If Seller erroneously ships to destination other than that named by Buyer, he is absolved of blame for loss because of market depreciation and additional freight, by a showing that he immediately requested carrier to divert to correct destination and obtained a new bill of lading to such destination. (California Bean Dealers Association Arbitration No. 12, 1920, Page 114).

Failure on the part of a carrier to effect diversion requested by Seller is not chargeable to Seller and he is not responsible for either filing or collecting claim against the carrier. (California Bean Dealers Association Arbitration No. 12, 1920, Page 114).

Seller Not Responsible for Carrier's Error—Failure to Effect Diversion—Discovery of Mistake—Buyer's Diversion Right Pre-supposed—A sold to B a given quantity of Choice Recleaned **Lima Beans,** F. O. B., California shipping point. Buyer made claim for damages in the sum of $4,875.87 alleged to have been sustained by reason of Seller's failure to ship the goods to a proper destination. Buyer gave Seller instructions to ship the goods to a named destination, but the goods were consigned erroneously to New York City by the Seller. Immediately upon receipt of the original bills of lading, Seller discovered the error in destination and promptly applied to carrier for new bills of lading covering diversion to the proper destination, originally instructed by Buyer. The carrier promptly issued new bills of lading. The record showed that the carrier did not effect diversion at proper destination, but delivered one car at Albany, New York, and another car at New York City.

Buyer claimed that because of the unusual delay in delivery, and the market decline, together with extra freight charges of $420.06, which he was assessed, he was damaged in the sum of $4,875.87, and that he would not have sustained such loss had Seller followed instructions to make shipment to proper destination.

The record showed that the new bills of lading covering the diversion were requested by Seller under date of August 5, 1920, and issued by carrier August 6, 1920. Shipment was made August 4, 1920.

Held, That the error had been promptly discovered and immediately corrected by Seller and Buyer was in no way damaged thereby. On the contrary, Seller used due diligence immediately to correct the error before the cars had reached either the correct or erroneous destination. The right of diversion pre-supposed on F. O. B. cars Pacific Coast contracts, does not enter into consideration herein, since Buyer did not desire a diversion to any other point than the original designated

by him, although Seller offered to pay any additional expense in the event another diversion were desired. The railroad company furnished bills of lading to Seller for the proper destination, and, as far as Seller was concerned, had the railroad carried out his diversion instructions, which the carrier was obligated to do on furnishing the bills of lading, there would have been no delay in goods reaching destination. Buyer very properly accepted the bills of lading showing that diversion had been requested and that proper destination was prescribed for the shipments. Neither the Buyer nor the Seller could do more than this, and even though the goods had been intentionally shipped to another point and subsequently diverted to the required destination, the Seller would have fulfilled his obligations as to an F. O. B. California point shipment. Seller furnished proper shipping documents to Buyer, and any failure of delivery within the usual time or at the proper place is entirely the responsibility of the carrier, and Buyer should look to the carrier for any damages arising from non-fulfillment of its bill of lading obligations.

Buyer demanded that Seller file the claim against the carrier for his own account.

Held, As a matter of courtesy, we request that Seller accord Buyer every possible assistance in making and pressing his claim against the carrier, but there is no legal obligation on the part of the Seller to file such claim. (California Bean Dealers Association Arbitration No. 12, 1920).

Effect of War on Contracts

Act of Government—Effect on Contract for Goods to Be Manufactured—Express Limitation as to Export License and Priority Permit—Cancellation Not Allowed—An exporter placed an order with a steel manufacturer for fifty tons of **Galvanized Barbed Wire,** F. O. B. Pittsburgh District for shipment to Calcutta, India. The sale and purchase were made September 5, 1918, during the world war. Shipment was to be made "as soon as possible from mill, subject to receipt of export license." Under date of August 14, 1918, Seller wrote Buyer confirming his quotation for the wire, and in accepting the order made specific reference to this letter, which contained the following conditions regarding the shipment:

> Shipment can probably be made from the mill during the latter part of December or January, with a chance for improvement. This, however, is merely an indication of what we hope to be able to accomplish, and we assume no obligation to make shipment by any definite date, shipment being necessarily subject to strikes, accidents, railway freight embargoes and all other causes of delay beyond our control or that of the manufacturing company, and if and when permitted by the United States Government.

The order of September 5, 1918, for the steel as originally drawn by Buyer read as follows:

"Shipment. October-November, 1918, from mill, subject to cancellation if export license not received."

At Seller's request this was changed to read as follows:

"Shipment. As soon as possible from mill, subject to receipt of export license."

The export license was duly received but the Priority Committee of the War Industries Board refused to issue a priority certificate for the manufacture of this lot of wire and Seller on that account could not proceed to manufacture the same at that time.

On October 14, 1918, Buyer notified Seller that Buyer's application for priority certificate had been denied and asked Seller to cancel the order and to confirm this cancellation. Again on November 21, 1918, Buyer notified Seller that his Calcutta house had cancelled the order

on account of delay and Buyer again asked Seller to confirm cancellation. Seller, however, on November 22nd, declined to accede to Buyer's request for cancellation. After November 29th, the priority certificates being no longer required, Seller proceeded to manufacture the barbed wire and on March 4, 1919, notified the Buyer that the goods were about ready and asked for shipping instructions. Buyer on March 11th notified Seller that they could not recognize any liability in the matter and again asked that the order be cancelled and this notice was received by Seller on March 12, 1919.

The questions at issue were (1) the right of Buyer to cancel the contract without the consent of Seller, and whether the contract was cancelled and, if not cancelled, (2) what damages, if any, was Seller entitled to receive through refusal of Buyers to fulfill the contract.

Held, That Seller's letter of August 14th specifying conditions under which the quotation was made contained the clause *and we assume no obligation to make shipment by any definite date, shipment being necessarily subject to strikes, accidents * * *, and if and when permitted by the U. S. Government.* The words *and when permitted by the U. S. Government* precludes any limitation being claimed for time of shipment if the government permits were lacking and confirms the Seller's claim that they intended this to be a positive sale without the right of cancellation. The striking out of shipment dates and of the words referring to cancellation in the order for the goods and substituting that shipment would be made *as soon as possible from mill, subject to receipt of export license,* seems to show that it was in Seller's mind that the order could not be cancelled on account of delay in shipment.

It will be noted that the shipment was subject to receipt of export license, but not to receipt of priority certificate, which latter might be granted at some indefinite time.

The contract is to a certain extent one-sided and clearly to the Seller's benefit and this is admitted by Seller, who claimed he would only accept the order at that time under such conditions. Buyer, however, had notice of this when he signed the order as changed by Seller. Furthermore, the "general conditions of sale" referred to by Seller in his letter of August 14, 1918, to which they stated in said letter the sale was subject, contains the following clause, "*insistence upon suspension of manufacture or suspension of any shipment, if not acquiesced in by Seller, may be treated by the Seller as a wrongful termination of the contract upon the part of the purchaser; and the purchaser shall therefore be liable for all damages arising out of such termination.*"

No evidence was introduced that Seller did not proceed to manufacture the wire and make same ready for shipment as soon as possible after priority certificates were no longer required. We decide that under the terms and conditions of this particular sale Buyer did not have the right to cancel on account of delay in manufacture and shipment and that the contract remained in force.

We decide that Seller is entitled as damages in this case to such differences as may have existed between the contract price and the prevailing market price for export of the said barbed wire on March 12, 1919, which was the date when Seller received notice from Buyer that he would not recognize liability in the matter, which constituted Buyer's definite refusal to accept delivery. (San Francisco Chamber of Commerce Arbitration, 1920).

F. A. Q.

The term F. A. Q. means Fair Average Quality. Usually it is followed by the words *of the season,* when it follows that the goods so described are the fair average quality of the season. This description of grade permits of a wide latitude in determining the quality of goods so described, since all of the crop of a commodity must be considered in arriving at the *average of the season.*

In general, it may be stated that the term F. A. Q. should be avoided whenever it is possible to fix a standard of grade in the commodity under contract, thereby avoiding uncertainty and eliminating one of the frequent causes of dispute between Buyer and Seller.

In a contract specifying *Manila Grade Coconut Oil,* without the qualifying clause of F. A. Q., arbitrators were of the opinion that, even in the absence of such term, the description *Manila Grade* must of necessity call for *F. A. Q. Manila Grade.* (Foreign Commerce Association Arbitration No. 46, 1922, Page 121).

Color Reading of F. A. Q. Manila Grade Coconut Oil—Better and Poorer Deliveries Must Be Considered—Contract Should Fix Color Limits—A Philippine manufacturer sold to a manufacturer in the United States a given tonnage of "Manila Grade **Coconut Oil**, basis 5 per cent, maximum 7 per cent free fatty acids," with the customary allowances provided for excess acidity.

The Buyer claimed that the oil was not F. A. Q., and laid particular stress upon the following points: (1) That Seller had sold Manila Grade Coconut Oil of fair average quality; (2) that the oil was not F. A. Q. in that the delivery ex "Gaelic Prince" showed 12 red and the delivery ex "Delagoa Maru" showed 11 red in the Lovibond color tests at the time of shipment; (3) that the Arbitration Committee of the New York Produce Exchange had rendered a decision under date of July 15, 1921, fixing the limits of F. A. Q. Manila Coconut Oil at a point under 12 red. Buyer, therefore, claimed an allowance of 1/8 cent per pound on the entire shipment. No other features of the contract, dated August 29, 1921, were in dispute.

In support of the limitation on color, the Buyer submitted information as to deliveries made to him of approximately 4,000 tons of Manila Coconut Oil in which the color was declared to be not darker than 7.5 red.

The arbitrators said:

"The contract is C. I. F. in terms, somewhat modified by guarantee of acidity and weights on arrival, subject to the published rules of the Foreign Commerce Association. The Association has no published rules covering C. I. F. sales, and therefore, the ordinary F. O. B. cars rules could not be held to apply to this contract except insofar as they might indicate or establish a custom of trade in connection with the particular commodity and thus aid in construing an ambiguous clause in this contract. The contract, as to quality, described the oil as basis 5 per cent, maximum 7 per cent F. F. A. This is not identical with the grade covered by Association Rule No. 329, under which rule, in addition to a guarantee of free fatty acids, there is a guarantee as to moisture and impurities and a further provision that the oil shall be fair average quality of the season of the country in which it is pressed.

"As to whether the term 'Manila Grade Cocoanut Oil' is synonymous with F. A. Q. Manila Coconut Oil, the arbitrators believe that full effect must be given to the words *Manila grade* as descriptive of the kind of oil sold. If Seller had not intended the words to mean anything they would not have been inserted in the contract. They add something to the description of the grade of oil in addition to the guarantee of free fatty acids content and the only reasonable interpretation is that in selling Manila Grade Coconut Oil, Seller intended to sell and Buyer had a right to assume that he bought F. A. Q. or ordinary, or usual Manila grade. Therefore, in the opinion of the arbitrators, even in the absence of the term F. A. Q., the term 'Manila grade' must of necessity call for *F. A. Q. Manila grade.*

"The Association rules, as well as the custom of trade, give various standard grades of Coconut Oil, some providing for color as the standard of quality and others for free fatty acids standard. The Buyer and Seller in this transaction have elected to trade under description of quality fundamentally predicated upon the free fatty acids content of the oil, and without any specific guarantee of color. Nevertheless, the arbitrators believe that under F. A. Q. sales color is implied, but only within certain very wide ranges.

"In order to arrive at what is within fair average quality of the season as to color, the trade must take into consideration not only the very best and the average deliveries as to color, but also the run of poorer deliveries as to color. In this connection, the arbitrators have examined the records of Curtis & Tompkins, chemists at San Francisco, covering a little less than 500 samples and tests made during 1919, 1920

and 1921. In 1919 the minimum red reading was 4.6, the maximum 21.7; in 1920 the minimum red reading was 6.2, the maximum 21.0; in 1921 the minimum red reading was 5.7, the maximum 22.5. In taking red color into consideration full weight must be given to these authentic data.

"It is true that a decision has been rendered by the Arbitration Committee of the New York Produce Exchange touching upon color of F. A. Q. Coconut Oil. However, all of the contract conditions in that case are not before the arbitrators at the present time and it, therefore, does not appear to the arbitrators that they must necessarily follow this decision. The arbitrators believe that where Buyers desire a limitation upon color of oil they should resort to specifically fixing such color limitation in their contracts of purchase as already provided for in special quality rules. In the absence of such limitations, the arbitrators must take into consideration the wide variance in color of Manila Coconut Oil in order to arrive at the F. A. Q. of the season.

Held, That, in view of the data made available to the trade through reputable chemists, coupled with their own experience, the arbitrators are of the unanimous opinion that the oil delivered ex "Gaelic Prince" and ex "Delagoa Maru" is Manila Grade Coconut Oil and, although admittedly high in color reading, is nevertheless within the limits which might reasonably be expected in F. A. Q. Manila Oil, and the claim of Buyer is therefore disallowed. (Foreign Commerce Association Arbitration No. 46, 1922).

F. O. B. Foreign Port

Coffee Sold F. O. B. San Salvador Port, Resold to Genoa, Italy, Merchant—Responsibility for Award of London Arbitrators on Question of Quality—A, a San Francisco merchant, sold to B, another merchant in the same place, a quantity of unwashed **Salvador Coffee,** F. O. B., Salvador port. The contract was silent as to whether Buyer was to have his agent inspect the coffee. Payment was to be made *as soon as A received a cable that the coffee had been delivered to B's Agent at San Salvador.* B resold the coffee to a merchant in Genoa, Italy, and when it arrived there objection was made as to the quality. The question of quality was submitted to arbitration by B and the Genoa merchant, and the place of arbitration was London. The arbitrators made an award in favor of the Genoa merchant and against B, who in turn proceeded to arbitrate in San Francisco with A, after demanding and having been refused reimbursement for the amount of the award made by the London board.

A, the Seller, contended that his obligation terminated when his agent in San Salvador delivered the coffee F. O. B. Salvador port, and B's agent accepted it, with or without inspection. The Buyer contended that Seller's responsibility as to quality followed the coffee to any point of destination to which Buyer might subsequently ship it on resale to a third party. It will be noted that the contract was silent in regard to the coffee being subject to inspection for quality and arbitration at destination if quality should be claimed to be inferior to that purchased.

The arbitrators said that they were not able to read what was in the minds of the contracting parties at the time the sale and purchase were made, and therefore considered the terms of the contract and the evidence submitted. The arbitrators said that if it had been demonstrated that A could have obtained redress from his supplier there would be a moral obligation upon the part of A to reimburse B. There was no evidence that this could be done.

Held, If it had been intended that in an F. O. B. sale, Salvador port, the quality was subject to determination at point of final destination, and arbitration in case of dispute, the contract should have so stated. Nothing, however, was said in the contract about arbitration at destination, and it was admitted by both parties that they had no verbal understanding in regard to such arbitration being held. The claim for reimbursement is disallowed. (San Francisco Chamber of Commerce Arbitration, 1918.)

"Full Cargo" Sales

Buyer Entitled to All Copra Loaded in Vessel, Notwithstanding Estimated Tonnage on Contract Was Considerably Less—Term "Full Cargo" Is Not a Limitation of Quantity—A, an importer, sold B, a full cargo of **Copra** of about 600 to about 700 long tons * * * loading at Fiji, per schooner "Alumina." The charter party provided that a *full cargo* of copra in bulk and/or in sacks must be shipped by the importer. It developed when the vessel was loading that the carrying capacity was 900 tons and the importer was obliged, under the charter party, to load 900 tons in order to furnish the required full cargo.

Upon arrival of the vessel at a Pacific Coast port, the Buyer claimed the right, under his contract of delivery, of the full cargo of 900 tons, while the Seller contended he was obliged to deliver only "about 600 tons to about 700 long tons" and if he delivered within 10 per cent of 700 tons he would have fulfilled his contract.

Held, That the words *full cargo* constitute the governing clause in the contract as to quantity, and that the words *about 600 to about 700 long tons* refer only to the estimated carrying capacity of the vessel. If the governing clause, *a full cargo,* was not intended to mean a *full cargo,* it was entirely superfluous and why was it inserted? If the 600 to 700 tons were to be construed as limiting the amount there should have been included in the contract the words *not less than about 600 nor more than about 700 long tons.* In this instance no evidence was introduced to show that the vessel had previously carried copra and it being a well known fact that copra is not a dead weight material, it was impossible for the principals in this case to more than get a rough estimate of the tonnage the vessel would. carry. Buyer shall take delivery of the entire cargo ex the S/V "Alumina." (San Francisco Chamber of Commerce Arbitration, 1917).

Future Sales

Future Sales "Subject to Opening Price" of Another Packer —Such Price Shall Control—Subsequent Reduction Made Retroactive Does Not Apply—An exporting company purchased a quantity of No. 1 Tall Alaska Chum **Salmon,** "Price to be Seller's opening price, guaranteed against published opening prices" of another named packer.

Under date of September 8, 1919, Seller issued his opening price for No. 1 Tall Alaska Chum Salmon at $2.10 per dozen, and under the same date the other designated packer fixed the identical opening price for the same grade of Salmon.

Buyer claimed that the packer upon whose opening price the sale was predicated reduced his price on Chums, 1919 Pack, to $1.75 per dozen and had made this lower price applicable on sales made by it for that season. Buyer claimed that while the other designated packer *published* opening price was $2.10, its *effective* opening price was $1.75, and he claimed Seller should allow him the reduced price of $1.75 on the 2,500 cases in question.

Held, That the sale in question, under the contract, was clearly based upon the *published opening price* of another designated packer. This cannot be changed to mean any *effective* opening prices made subsequently. The published opening price was made September 8, 1919, and the price was not reduced until October 15, 1919, over a month later and the making of such reduced price applicable to previous sales, based upon the published opening price, must be voluntary upon the part of sellers in any particular cases and is not obligatory. (San Francisco Chamber of Commerce Arbitration, 1920).

Inspection

Under a C. I. F. contract covering **Prunes,** certificate of inspection of the goods issued at time of shipment is final under the so-called Water Contract of the Dried Fruit Association of California. (Dried Fruit Association of California Arbitration No. 1, 1921, Page 47).

Goods Sold F. O. B. Dock, San Francisco, Subject to Inspection, Must Be Inspected Before Export Shipment—Weights at Point of Shipment Govern—A Pacific Coast company purchased from an iron company a given tonnage of **Plate Cuttings.** Under date March 13, 1920, Buyer accepted a verbal option given by Seller's representative, the acceptance specifying:

> Fifty tons of 2,000 lbs. each, Steel Plate Cuttings, Good quality mild steel, all flat and cut parallel, no chequered plates, dimensions ¼ inch to ½ inch thick, 1 to 6 inches wide, 15 inches to 20 inches long, material to be packed compactly in barrels for export. Price, $41.00 per ton, F. O. B. dock, San Francisco.

Seller in letter dated March 15, 1920, confirmed Buyer's above order of March 13th. The order was given by Buyer with the understanding that the goods would be subject to Buyer's inspection at Seller's yards.

Seller in his letter of confirmation of March 15th stated: "This material is now available for shipment and can be inspected at our yards at any time."

Buyer claimed that when his surveyor called at the yards to inspect the goods he found the goods were already packed in barrels ready for shipment, the tops of the barrels being covered with burlap fastened on the barrels, so that he could not inspect the contents without unpacking the shipment, and he was shown only a small sample and that, therefore, he did not make an inspection. Buyer stated that his Hongkong purchaser claimed that, upon inspection there, it was found that the goods were not up to specifications as they consisted of a considerable quantity of pieces of checquered plating and a small percentage not rectangular or flat, which did not conform to specifications as to size. Buyer claimed an allowance of $761.61 for difference in quality and $210.61 for alleged short out turn weight at Hongkong.

Held, That the goods, having been sold F. O. B. dock, San Francisco, with the right of inspection at Seller's yards, it was the duty of Buyer to inspect them before shipment. The fact that the goods had been packed in barrels ready for shipment did not prevent such inspection, for Buyer's surveyor would have been entirely justified in selecting random barrels of at least 10 per cent of the shipment, cutting the burlap covering and dumping contents so that he could inspect same, if Seller chose to pack the goods prior to inspection, which he knew would be made. Buyer's claim is disallowed on the grounds that the goods were purchased subject to inspection and Buyer should have inspected the goods and found objection to quality, if any, at that time, or, if he was willing to waive inspection because goods were packed, he should have obtained a written guarantee from Seller agreeing to make good any loss suffered by Buyer in case the goods were found not as per contract. As to short weight claimed at Hongkong, the price being based on F. O. B. dock, San Francisco, such San Francisco weights must govern. (San Francisco Chamber of Commerce Arbitration, 1920).

Insurance

Payment of Extra Cost on Deckload of Lumber—Where Mill Cost Governs—A shipper of lumber and a vessel owner had a dispute as to the responsibility for the payment of extra insurance on a deckload of lumber in the off shore trade, the shipper contending that the owner should pay for the extra insurance, based on the sale price of such deckload, plus the customary 10 per cent, while the vessel owner claimed that the cost price at the mill should be the basis of payment for extra insurance.

The charter party submitted to the arbitrators contained the following clause: "Vessel to pay the extra insurance on deck load (not to exceed under deck rate), which is to consist of only the longest sizes of the rough lumber unless otherwise instructed by charterers."

Held, That the insurance should be based on the cost price at the mill, i. e., the contract price of the purchase, plus 10 per cent, which has been customary in the trade for many years past. (San Francisco Chamber of Commerce Arbitration, 1917).

Typewritten Clause in Insurance Policy Controls Printed Clause—Delay in Documents Covering C. I. F. Sale—Where Seller Guarantees Buyer Against Expense Incurred by Delay—A Pacific Coast importer sold to a San Francisco dealer a quantity of No. 1 Long Grain **Saigon Rice,** February-March shipment from the Orient, C. I. F. Santiago, Cuba. The contract was dated March 8th. March 26th bills of lading, with February dating, insurance policies and quality certificates covering a portion of the contract quantity of rice were presented to Buyer, together with a letter guaranteeing payment of any charges that might accrue at Santiago, Cuba, by reason of the arrival there of the S. S. "West Cajoot", which reached the destination on March 20th, in advance of the documents.

The Buyer objected to the tender of documents on the following grounds:

1. There were conflicting clauses in the insurance policy, namely, the face of the policy bore the typewritten notation *with average as usual,* while the *printed* body of the policy specified *not subject to average on shipment of Rice.*

2. That the carrier had arrived at destination March 20th, five days prior to presentation of documents.

3. That the papers, having arrived at San Francisco at such a late date, what was intended as a *future* sale became a *spot* transaction, inasmuch as the bills of lading show a dating of February 3rd and were

not presented until 52 days after shipment, and, therefore, the cargo should have been sold as *afloat.*

Seller contended that his documents were entirely in order, that the typewritten clause in the insurance policy controlled the printed clause, and was usual, and that the delay in receipt of the documents was evidently due to the mails and through no fault of Seller. Further, that the contract provided for payment on presentation of Oriental shipping documents or delivery order.

Held, (1) That the objection to the insurance policy is not well taken in this particular case, and that the policy is regular and in order.

(2) That the question whether the rice was actually afloat at the time of making the contract is immaterial, for the reason that the purchase was made for February-March shipment.

(3) That the delay in presentation of documents is not vital, inasmuch as Seller guarantees protection to the Buyer against all charges which may accrue on account of documents not having been presented before arrival of the vessel at Santiago. (Rice Association of California Arbitration No. 18, 1920).

WAR RISK INSURANCE

When a contract for goods on a delivered basis is silent as to the placing of war risk insurance, such insurance, if placed, is for the Seller's account.

The rule would be different under C. I. F. terms, the Seller being responsible for usual marine insurance only, and war risk would be for Buyer's account, if required by Buyer.

War Risk on Goods Under Delivered Contract — In May, 1914, a San Francisco importer, sold to a refiner a quantity of Straits **Tin** to be shipped ten (10) tons per month, commencing June, 1914, and ending March, 1915, deliverable at San Francisco ex steamer(s) from Singapore, Straits Settlements. In July, 1914, war was declared in Europe, and had an immediate effect on all shipments as war risk insurance was required. Prior to the August and September shipments, the Seller notified the Buyer that war risk insurance would have to be placed on all shipments and it would be for Buyer's account. Buyer objected, insisting that as he had bought the tin delivered and there being no mention in the contract as to war risk insurance, such was not rightly chargeable to him.

Held, That as the goods were contracted for at a delivered price, the tin remained the property of the Seller until delivery was effected, and therefore, if war risk insurance was necessary it was for the account of Seller. (San Francisco Chamber of Commerce Arbitration, 1914).

Joint Account Purchase and Sale

Failure to Give Shipping Instructions Does Not Permit the Other Party to Abrogate Agreement—A, a California Bean shipper, and B, an Alabama bean dealer, purchased two cars of California **Beans** from C, also a California bean shipper. Under date of April 17, 1917, B wrote the following letter to A:

> "Gentlemen: For your information will state that we hold contract of C for two cars Blackeyes at 6½ cents, date of contract March 27, 1917.
>
> Will state that we hold one car of this contract subject to your orders, in that we own this contract jointly, you to have one car, ourselves one car.
>
> (Signed) B".

B claimed to have asked A for shipping instructions and failing to receive same, B took delivery of the car and handled it for his own account. Under date of January 11, 1918, B wrote to A in response to a request for settlement of the joint account, as follows:

> "Gentlemen: We wired and wrote you for shipping instructions on this car and having no response we presumed you did not want the goods and felt that your contract was cancelled."

Held, That failure to give shipping instructions does not cancel a contract. B would have been within his rights had he drawn upon A, with warehouse receipt attached, when shipping instructions were not forthcoming on or before October 31, 1917, when the time for shipment under the contract nominally would have expired. Instead of placing the shipment in warehouse and drawing upon A, with warehouse receipt attached, as is the custom of the trade, B took delivery of the car in question and handled same for his own account. Therefore, B shall forthwith make accounting to A for one minimum car of Blackeye Beans, crop of 1917, September-October delivery, purchased from C; said accounting to include all charges and expenses to which B was put, and shall forthwith pay to A the profits derived thereon, less charges and expenses. (California Bean Dealers Association Arbitration No. 25, 1917).

Lumber

Buyer's Inability to Obtain Specifications for Lumber from Foreign Buyer No Excuse for Non-Performance of Contract—Nor Is Buyer Excused for Inability to Secure Vessel for Cargo—Damages for Non-Performance—On February 25, 1914, Buyer contracted to purchase from Seller approximately 3,500,000 feet of **Douglas Fir,** 15 per cent more or less to suit capacity of vessel, shipment to be by steamer October-November-December, 1914. On March 5, 1914, a similar contract for the same amount of lumber and same shipment was made.

The Seller claimed that specifications for the lumber were not furnished, nor was any vessel named, nor was delivery of the lumber taken by Buyer before the expiration of the time limit for shipment of both cargoes, under the contracts, viz.: December 31, 1914. Buyer admitted this was correct, but claimed that he had been unable to give specifications on account of not being able to get them from the parties in Australia to whom he had sold the lumber and that he had not named a vessel and taken delivery on account of not being able to secure a vessel.

Buyer on September 24, 1914, proposed cancelling the contracts, but this was refused by Seller and there was no evidence that Buyer offered at that time to pay any damages on account of cancelling the contracts.

The time for delivery under the terms of the original contracts expired December 31, 1914. There was no evidence that the Seller endeavored to terminate the contract on December 31, 1914, and charge the Buyer with the difference between the contract price and the prevailing market price on that date, or to notify Buyer that the lumber would be sold for Buyer's account which he had the right to do. Neither is there any evidence that the Buyer endeavored to exercise his right on December 31, 1914, to direct the Seller to sell the lumber involved in the contract, for Buyer's account, and charge Buyer with the difference between the contract price and the price at which the lumber was sold. On the contrary, the evidence submitted was clear in showing that both contracts were extended by mutual consent from time to time and that they were not terminated until March 17, 1915, at which time the Seller rendered to the Buyer a bill for $17,500 to cancel the two contracts in dispute, said amount being the amount Seller considered a fair difference ($2.50 per M ft.) between the contract

price of the two cargoes and the going market price that day. That Buyer considered the contracts extended from December 31, 1914, is evidenced by his letter of February 17, 1914, to Seller in which he states "we appreciate the extension in time which you are giving us on this lumber, and we are doing everything within our power to arrange for lifting these cargoes at an early date." Also, in the same letter his statement "again assure you that we will take delivery of the lumber as soon as the first opportunity presents itself," and further by verbal conversations subsequent to that date as testified to before the Committee by both parties.

Held, That the contracts were extended by mutual consent and that they were not terminated until March 17, 1915, and that the prevailing market price for Douglas Fir lumber on or about March 17, 1915, was $8.50 per M ft. for steamer shipment. The Buyer had the option of taking 15 per cent more or less of the contract amount to suit capacity of vessel. As no vessel was named and therefor it cannot be determined whether more or less than the 7,000 M ft. would have been taken, we fix 7,000 M feet, as a fair estimate of the amount that would have been taken.

As it is conceded by Seller that the lower priced cargoes would have been taken if shipped, we find that the contract price involved in this case is $10.50 per M ft. less 2½ per cent twice, or $9.9816 net, and that the cost under the prevailing market price on or about March 17th would have been $8.50 per M ft. less 2½ per cent twice, or $8.0803 per M net, and that the actual difference between the contract price and the prevailing market price on or about that date would have been $1.9013 net per M ft., which for 7,000 M ft. would have amounted to $13,309 if such actual difference were to be made the basis for damages in this case. The Committee, however, has taken into account the extraordinary conditions caused by the present war in all the exchanges of this country and in other financial communities of the world, and we therefore fix the lump sum of $10,000 as a fair settlement in this case between the contracting parties. We decide that Buyer shall pay the Seller that sum in full settlement for all claims for failure to take delivery under said contracts. (San Francisco Chamber of Commerce Arbitration, 1915).

Damages for Failure to Lift Cargo Under Contract—An Oregon mill sold 600,000 feet, 15% more or less, Rough **Oregon Pine** Lumber, to be loaded at an Oregon port May–June–July–August, 1920. The contract was dated March 5, 1920. The price was to be $34 per M feet, basis "H" list, if vessel commenced to load any time in May or

June and $36 per M feet, basis "H" list, if vessel commenced to load any time in July or August.

Buyer was not able to furnish vessel in time to make August loading and Seller claimed $4500.00 and interest, claiming this amount to be the difference in price that he sold to Buyer, $36 base, net cash, and the price at which he eventually did sell the lumber, viz: $30 base, less 2½ per cent commission and 2½ per cent discount. Buyer claimed that the price of $30 base, was less than the market price at that time and that Seller's claim was excessive.

Held, That Buyer was in default in that he did not tender the vessel for loading within the time limit of the contract, as the "Honoipu", which he specified as having been tendered under the contract for lifting the cargo, would have made September loading, instead of August loading.

We find that the specification for lumber tendered by Buyer was a proper one but feel that this has no bearing on the matter, the vessel not having been tendered for loading in the proper month, as above stated.

We find that the average price for lumber of the description named at that period of time was about $31 per M, and we decide that Buyer shall pay to Seller at the rate of $5 per thousand feet, or $3000 as the difference between the contract price, $36 for July–August loading, and $31 and also interest at 6 per cent on said amount from Sept. 1, 1920, until paid, and that said payment shall constitute full settlement of all claim in this case. (San Francisco Chamber of Commerce Arbitration, 1921.)

Crating of Lumber for Export—Damage for Improper Packing—A sold to B 40,000 feet of **Redwood** for shipment to Salvador per S. S. "Joan of Arc" in 1919. The contract provided for Green Clear T & G Redwood, crated, 5/8x4-10/16′, price $47. S. M., delivered at San Francisco for export. This order followed a quotation by Seller on July 7, 1919, for the above lumber, in which the packing was specified *crated for export* and on July 12th Buyer confirmed his acceptance of this offer. On August 13th Buyer notified Seller that the receipt of the steamer on which goods were shipped from mill to San Francisco called for "691 bundles" instead of 691 crates, and that if the lumber was not properly crated for export shipment Buyer would hold Seller responsible for any claims that might arise on that account.

Seller on August 15th replied that his inspectors reported the goods were crated in the usual manner for export and he disclaimed any responsibility should claim be entered. The goods were shipped on August 20, 1919, according to bill of lading, to San Salvador with transshipment at La Libertad.

Buyer subsequently made claim on Seller for 25% of the C.I.F. price of the shipment consisting of above 40,000 feet of T & G Redwood Lumber, the invoice price being $2,603.51, on which he claimed $650.88 for damages which he had allowed his buyers in San Salvador on account of damaged condition of the lumber upon arrival due to the T & G not being properly crated. This claim was disputed by Seller.

Held, That Seller was at fault because the evidence shows that the lumber was not properly crated for export. On the other hand we find that Buyer was negligent in not rejecting the shipment at San Francisco if he felt the goods was not crated as per contract, or in not insisting that Seller crate the goods in a better manner, as was done by him on a subsequent shipment of the same kind of lumber.

We accept the appraisement of a construction engineer at San Salvador for the damage to the goods at 25% as correct. We feel, however, that Seller's liability cannot be expected to follow goods to ultimate destination, for there is no way of determining what kind of handling the goods would receive from various carriers while enroute to ultimate destination.

Therefore, we find that a fair basis for arriving at the damages in this case is an allowance of 25% of the ex dock San Francisco value for the T & G lumber, which allowance would be $470.63.

As we find that both parties were equally at fault, we decide that one half of said amount of allowance, or $235.32 should be for the account of each party at interest and that Seller shall pay to Buyer the sum of $235.32 as settlement of this claim. (San Francisco Chamber of Commerce Arbitration, 1920.)

Meaning of Term "Random" Lengths in Lumber Contract —Where Contract is Impossible of Performance—Indefinite and Uncertain Contract—A sold to B about 100,000 feet of T & G **Douglas Fir Flooring** at $41 per M feet, and the same quantity of **Douglas Fir Channel Rustic** at $45 per M feet. Subsequently Seller, at the request of Buyer, furnished an additional quantity of Flooring and Rustic to make up a full cargo.

The contract itself was indefinite, in that there was first a verbal order, a written confirmation and a formal confirmation by Seller, followed by a formal confirmation of the order by Buyer. There was a variance in the term as to the lengths of lumber to be furnished. The original verbal order called for lengths 10 to 24 feet. In Seller's confirmation of the verbal order the lengths were specified as *random.* In the formal acknowledgment of the order the lengths were set forth as "10/24'." Two points were in dispute namely:

First—Respecting the short length lumber (under 10 feet) which was shipped.

Second—Respecting the length of the lumber covered by the original order, i.e., whether random or specified lengths.

Held, That the generally accepted meaning of the trade terms "random" and "10/24'", without any modifying clauses, are synonymous.

In the formal acknowledgment appears a clause stating substantially that if the acknowledgment is not in accordance with Buyer's understanding, immediate attention should be called to any errors. It is not in evidence that attention was called by Buyer to any error.

The formal written confirmation of order by the Buyer, however, contained a clause covering the lengths of lumber, different from that contained in the acceptance and acknowledgment, which clause was as follows: *And not to exceed* 10% *of each length.*

No particular attention was called by Buyer to this additional clause but it is in evidence that Seller, upon receipt of the confirmation, did call attention to the discrepancy and particularly to the fact that as the order then read it was not possible of fulfillment as there were only eight lengths between 10 and 24 feet, inclusive, with the result that the order would be only 80% filled. The Buyer's confirmation had been altered by having a pencil line drawn through the above mentioned clause affecting the percentage of lengths, but this alteration was not initialed by either party.

Due to the conflicting nature of the testimony introduced, the Arbitrators are unable to determine whether or not this alteration was made by mutual consent of both parties, but inasmuch as the clause specifying *and not to exceed* 10% *of each length* is impossible of fulfillment, we find that this clause must be disregarded.

We find that Seller filled the order in accordance with the conditions of his acceptance, to which no specific exception was made by Buyer, and also in accordance with the formal confirmation of the order by Buyer, after the impossible conditions of same had been eliminated, excepting, however, as hereinafter noted.

No provision in the order or acceptance was made for any lengths of Flooring or Rustic shorter than 10 feet, of which 9641 feet were eventually shipped.

The Arbitrators have carefully weighed the testimony in regard to the causes that led to the short lengths being shipped and find that the preponderance of evidence indicates that an agreement had been reached covering the disposition of the short lengths.

The evidence shows that the error was discovered by the Buyer prior to the loading of the vessel and that Seller had noted same before vessel was loaded and before Buyer had called attention to same and had detailed a man for the specific purpose of either laying out or directing the laying out of the short lengths, and that this man, after working thereat several hours, had been recalled. Having detailed a man for the specific purpose of having the short lengths laid out, it does not appear reasonable that he would have been recalled unless an agreement had been reached by which the short lengths would be shipped, which agreement Seller testifies was reached, the basis being an allowance of $8.00 per thousand for short lengths. This evidence s imaterially strengthened by a certain letter, dated June 10, 1920, written from Portland by a representative of Seller who made the sale for Seller to another representative of the same company in which he confirms the statements and verbal testimony introduced by the Seller before the arbitrators. We decide that the preponderance of evidence shows that an agreement had been reached covering the short lengths, and that an allowance of $8.00 per thousand feet was to be made by Seller from the invoiced price.

In conclusion we find that there were 7440 feet of Flooring under 10 feet in length shipped, and that there were 2201 feet of Rustic under 10 feet shipped, a total of 9641 feet, and we decide that a deduction from the invoice shall be made of $8.00 per thousand on the above quantity, and that Buyer shall pay to the Seller the balance due on his invoice after the above deduction has been made and that said payment, when made, shall constitute full settlement of all claim in this case.

We disallow Buyer's claims for allowance for alleged disproportionment of deliveries under the lengths ordered and for freight on the short lengths. (San Francisco Chamber of Commerce Arbitration, 1920.)

Minimum Carload

There is a variance in rules covering minimum carload, according to the trade concerned. The rule recognized in the California Bean trade is that, in the absence of a specific clause in a contract fixing the car weight, that carrying the lowest freight rate shall obtain.

The rule covering general commodities of the Foreign Commerce Association is as follows:

"Minimum carload shall be as provided for by railroad tariff and/or regulations as in force on date of contract, and any change in the minimum shall be for Buyer's account." (Foreign Commerce Association Rule No. 19).

The rule covering shipments of Vegetable Oil is as follows:

"The minmum carload shall be as provided for by the joint railway tariff association or Government regulation as in force on date of contract." (Foreign Commerce Association Rule No. 268, New York Produce Exchange Rule 8, Section 3).

Buyer of Beans Is Entitled to Minimum Weight Car to Secure Lowest Rate—Payment of Taxes—A sold B "five minimum cars Choice Recleaned California **Lima Beans,** Crop 1918, F. A. Q. of the season." Owing to the fact that the railroad tariffs provide for two minimums in the case of bean shipments, namely, 60,000 pounds and 40,000 pounds, respectively; the 40,000-pound minimum carrying a slightly higher rate of freight than the freight charge on the 60,000-pound minimum, a dispute arose between Buyer and Seller. Buyer contended that in the absence of any reference in the contract as to which minimum car was intended to be covered by the contract, he was entitled to demand delivery of five 40,000-pound minimum cars. Seller insisted that he was entitled to deliver cars having a carrying capacity of 60,000 pounds. Seller also contended that as the law of California provides that taxes shall be assessed on goods on the owner's possession on the first Monday in March and as Buyer had unduly delayed giving shipping instructions on the cars so that Seller was obliged to pay taxes on the beans that he was entitled to be reimbursed for the amount of taxes. The contract called for shipment the "last week of February" and Buyer gave shipping instructions February 27th.

Held, That carelessness was shown on both sides in drawing the contract in not specifically designating the 40,000-pound minimum if such was intended or desired by either party, but in the absence of such designation there is, and at all times within the knowledge of the Arbitrators has been, an established trade custom that where no minimum car weight is specified the minimum car that could be tendered and should be accepted was the car that carried the lowest freight rate. This custom is so well established and understood that if any other car weight was desired it should and must be designated at the time the contract was made or the sale entered into.

As to the question of responsibility for payment of taxes:

Held, That the Buyer, in waiting until the next to the last day of February to tender his shipping instructions, was guilty of negligence, Seller is unquestionably entitled to be reimbursed for whatever sum the taxes upon these beans may represent. (California Bean Dealers Association Arbitration No. 28, 1919).

Mistake

The general rule is that arbitrators will not compel performance of contract conditions manifestly made by the parties through a mistake or misunderstanding. In commerce, as well as in law, there must be mutuality in a contract.

When it is clear that at no time did the minds of the parties meet upon a definite proposition covering the sale and purchase of **Prunes,** arbitrators will not compel delivery of the goods. (Dried Fruit Association of California Arbitration No. 2, 1911, Page 141).

Where the parties enter into negotiations by cable for a shipment of **Copra** and outward freight in a sailing vessel, a conflict in their respective understandings due to ambiguity in the cable correspondence will cause arbitrators to put aside the entire proposition as having been founded in a mistake. (San Francisco Chamber of Commerce Arbitration, 1920, Page 142).

When a broker verbally negotiated the sale and purchase of **Sugar** *duty paid ex dock San Francisco* and the Seller subsequently presented a contract to Buyer for his signature containing the customary clause in import contracts, namely, *any change in present duty shall be for account of Buyer,* arbitrators refused to consider a custom of trade binding upon either party when formal contract had not been signed. (San Francisco Chamber of Commerce Arbitration on Appeal, 1921, Page 145).

When a contract covering **Lumber** specifies *random* lengths (the term *random meaning* lengths 10 to 24 feet) and the further provision, *not to exceed 10 per cent of each length,* arbitrators will disregard that feature of the contract calling for only 10 per cent of each length, for the reason that there are only eight lengths between 10 to 24 feet, and that provision of the contract therefore is impossible of fulfillment. (San Francisco Chamber of Commerce Arbitration, 1920, Page 136).

Failure of Minds to Meet—Misunderstanding Arising Out of Cable Contract—A, a California packer, and B, a London merchant, exchanged a series of cablegrams relative to the sale and purchase of a quantity of **Prunes.** No deliveries or payment of money resulted from this correspondence, and the parties submitted the controversy that arose therefrom to arbitration before the Dried Fruit Association of California. The case is interesting only because it illustrates how easily a misunderstanding may follow negotiations by cable between

international merchants, and not because any vital principle of trade is settled by the arbitrament; unless it is that it be understood the first essential of business is that there shall be a meeting of minds between Buyer and Seller, and that a contract entered into by cable shall unmistakably express the exact understanding of the parties.

The first cable was an offer to purchase a quantity of Prunes at a named price, and was answered by a counter-proposal, naming a higher price. B responded to this offer in a cablegram that was garbled in transmission. From then on the parties seemed to have been hopelessly muddled and there followed seventeen additional cablegrams, two of which were a repetition of the message originally garbled and were delivered without correction as to the unintelligible portion thereof. The result of all this misunderstanding was that B made claim for his losses alleged to be due to A's failure to ship the goods.

Held, That while the whole matter is very complicated, it is clear to us that at no time did the minds of the principals meet upon a definite proposition, and therefore A is not required to deliver goods to B, who must bear any loss incurred. (Dried Fruit Association of California Arbitration No. 2, 1911).

Failure of Minds to Meet—Indefinite Cablegrams—Messages Must be Read Together and Not Separately as Explaining Meaning of Parties—A merchant at Apia, Samoa, and a Pacific Coast merchant exchanged a number of cablegrams in relation to the charter of a vessel for **Copra.** The transaction had its inception in 1918, and involved the charter of the vessel as well as the sale of copra to be shipped in said vessel.

October 31st Seller despatched an offer to sell *not in excess of 600 long tons copra.* This message was received by Buyer November 4th. The Buyer assumed that Seller had sold him enough copra to fill a vessel but not in excess of 600 long tons. The Buyer procured a vessel of 175 tons cubic measurement.

The matter then went to arbitration, and was subsequently appealed, the ultimate decision of the arbitrators on appeal being that there actually had been no meeting of the minds of the parties, therefore no contract executed between them.

The original arbitrators, however, held otherwise, their decision, given herewith, revealing the complication that arose as a result of indefinite cablegrams. The original arbitrators said:

"Buyer had the right to assume from the wording of the cable of October 31st, reading *What is estimated capacity vessel for bulk Copra.*

Confirm sale if not in excess of 600 long tons, that Seller had sold him enough Copra to fill the vessel, but not in excess of 600 long tons.

"From Seller's letters received, however, after the transaction had been completed by cable, it seems that Seller intended to convey the idea by his cable of October 31st that he confirmed sale of 500 to 600 tons copra, if not in excess of 600 tons. The cable, however, does not say this and we feel Buyer was justified in reading the cable to mean that Seller had on hand, or could furnish, any amount of copra up to, but not exceeding 600 tons.

"We feel that Seller acted in good faith in this transaction, as shown by his letters, but these letters were not received by Buyer until too late and the Committee can only consider cables exchanged, as these closed the transaction.

"We consider that, notwithstanding the cables which went before, Seller's cable of October 31st and Buyer's reply of November 8th constitute the offer and acceptance and constitute a contract for the purchase of the copra and the arrangement for downward freight.

"Seller claims he cancelled his offer of October 31st by his cable of November 9th, reading *Copra offer—no reply received, please cancel,* but it is pointed out that previous to receipt of this cable Buyer had on November 8th, cabled his firm acceptance and, therefore, Seller could not withdraw and, as a matter of fact, Seller did eventually furnish the cargo.

"It is also pointed out that in Seller's letter to Buyer, dated December 21, 1918, he stated he received on November 7th, Buyer's letter of October 21st in which Buyer advised Seller, *We have, however, secured vessel of 175 tons cubic measurement, which we have offered you by cable, as per enclosed copy.*

"This cable was as follows: *Schooner hundred seventy five tons can fix round trip you arrange downward cargo will purchase Copra basis yours sixth freight thirty-two fifty early November.*

"Seller received this cable on October 22nd and as the letter of October 21st, received November 7th, plainly stated the vessel's capacity to be 175 tons cubic measurement, he, therefore, had knowledge of the size of the vessel *before* he sent his cable of November 9th cancelling his offer, as he states, on account of having received no reply to his cable of October 31st, asking capacity of vessel.

"We decide that downward freight, together with dead freight, paid the vessel by Buyer, as per statement of Buyer dated December 24, 1918, amounting to $1,582.85, is for account of Seller. We disallow Buyer's claim for $1,036.31 expenses incurred by him in this transaction. In reference to the item of $694.01 for demurrage and cable expense in

that claim, there is no evidence to show that Seller obligated himself to pay any specified sum for delay or that he was in default in loading, and it is clear that these expenses were due to delay in Buyer's arrangements for credits and for payment by him of charges against vessel at Apia.

"We decide that Buyer was only required to receive copra up to the capacity of the schooner, which for 175 tons cubic measurement would be for about 90 tons bulk cargo, and it is shown that about 90 tons were loaded. We, therefore, disallow Seller's claim for loss of 20 tons additional copra.

"We disallow Seller's claim for various expenses as itemized in his statement of May 12, 1919, except item (g) for £9-6-9 for interest on purchase money for 89 T. 12C. 2Q. 14 lbs. Copra, £2240-15-8, from April 9th till April 28th at 8 per cent, which claim we allow.

"Summing up we decide:

"First—That Seller shall allow Buyer the sum of $1,582.85 for downward freight and for dead freight.

"Second—That Buyer shall allow Seller £9-6-9 for interest on purchase money for the Copra delivered. And that said allowances, when made, shall constitute full settlement of all claims in this case. (San Francisco Chamber of Commerce Arbitration, 1919.)

Reversed on Appeal—No Contract Existed Between Parties—The matter went to appeal, the arbitrators on appeal saying:

"It is clear to the Arbitrators on appeals that the cable from Seller to Buyer, dated October 31st, must read in connection with Seller's preceding cables, and it cannot be taken alone. We find that Buyer's cables were indefinite, notwithstanding Seller's request for more explicit information as to the amount of copra Buyer was prepared to purchase, and that Seller in sending his cable of October 31, 1918, had in mind his previous two cables offering 500 to 600 tons. That while Seller in his cable of October 31st agreed to sell to Buyer a quantity of bulk copra, if not in excess of 600 tons, at £25, F. O. B. Apia, he unquestionably had in mind, as per his previous cables, an amount of 500 to 600 tons, and in that cable he again asked for the quantity Buyer would take and stated that he would arrange for 175 tons of downward cargo, provided a satisfactory credit was cabled to the Bank of New Zealand and that he would wire an order on receipt of confirmation. Said credit satisfactory to Seller was not furnished, and Seller cancelled by his cable of November 9th his previous offer.

"It is also clear that Buyer had in mind the purchase of only a small lot of copra that would fill a vessel of 175 tons, although his cables

do not state what kind of tonnage was referred to and what would be the amount of copra taken.

"It is clear to this Committee that the minds of the parties at no time met in this transaction and we, therefore, reverse the decision of the Arbitration Committee and decide that no contract exists or existed between the parties. There being no contract between the parties, we decide there can be no claim allowed for expenses incurred by either in this transaction.

"We decide that Buyer shall refund to Seller the sum of $1582.25, which Buyer held out from the price he agreed to pay Seller for approximately 90 tons of copra eventually purchased by him from Seller. (San Francisco Chamber of Commerce Arbitration on Appeal, 1920.)

Meaning of Term "Duty Paid" in Event of Increase in Duty—Where One Party Misunderstood—Application of Trade Custom Reversed on Appeal—A sold to B, through a broker, 750 tons white Central American **Sugar,** duty paid, delivered, ex dock San Francisco. A dispute arose as to whether the duty in force at date of contract, namely Feb. 18, 1921, applied, or whether any change in the effective duty was for Buyer's account. Buyer contended that he returned the contract unsigned to the Seller and notified him that it should be made out in accordance with the terms of the original offer and purchase, maintaining that the term *duty paid* meant any change in duty after the date of the contract should be for Seller's risk and account. Seller insisted that it is usual for importers' contracts specifying *duty paid* to contain the customary clause that any change in duty shall be for Buyer's account, and this being so well understood by the trade that offers for sale of goods *duty paid* are always understood to be subject to that clause being contained in the contract when it is subsequently presented, and that being so understood and intended when making the original offer through his broker. Thus the question under submission was whether an increase in duty was for the account of Buyer or Seller.

Held, That in the absence of any written agreement between Buyer and Seller in this case setting forth the exact terms under which the sugar was being negotiated for, we find that trade custom shall prevail in the matter of change of duty. In view of the fact that it has been the custom of the trade in the import business to be done on the basis of any change in duty to be for the Buyer's account, and because of the fact that Buyer in this case did not object to this when accepting verbally the verbal offer from Seller's broker, we find that the term *duty paid* in this case is to be taken in conjunction with the clause customarily

contained in importers' contracts covering any change in duty, which clause provides that any change in duty shall be for Buyer's account.

We decide that if there should be any change in duty on the sugar in question, said change shall be for account of Buyer. (San Francisco Chamber of Commerce Arbitration, 1921.)

Reversed on Appeal—Failure of Minds to Meet—No Contract—The matter was appealed by Buyer on the ground that error was committed by the arbitrators.

Held, That the minds of the two parties at interest never met on the question of the meaning of the term *duty paid* when the verbal offer was made and verbally accepted, which is further evidenced by the fact that no contract has been signed by both parties.

Therefore, we decide that no contract between the parties was ever consummated for the purchase and sale of the particular lot of sugar in question.

We reverse the decision of the Arbitration Committee in this case, as in our judgment neither party can compel the other to carry out a contract that was never consummated. (San Francisco Chamber of Commerce Arbitration on Appeal, 1921.)

Refrigeration

Payment of Refrigeration Charges on Coconut Oil Under F. O. B. New York Contract—Refrigeration a Special Service —Not a Part of Freight Tariff—A Pacific Coast importer sold 900 tons of **Coconut Oil** in barrels to a New York manufacturer. The oil was to be shipped from Manila to the Pacific Coast and transhipped to New York during a period between February and July, inclusive, if possible, F. O. B. New York. The sale was based on the effective Transcontinental Freight Tariff, *any changes therein to be for Buyer's account.* A portion of this oil, namely 2,753 barrels, was shipped from the Pacific Coast to New York in August and September, and was accepted by Buyer. Seller made these shipments under refrigeration, charging the cost thereof, $2,201.68, to Buyer, claiming that the carrier would not accept the coconut oil for shipment in barrels in box cars during the summer months, and required it to move under refrigeration. Seller further claimed that he could not obtain tank cars at that time.

Buyer declined to pay the refrigeration charges, claiming that the Southern Pacific Lines did not refuse to ship such oil in barrels in box cars at any time provided the barrels were in satisfactory condition to the inspector and that Buyer would have furnished Seller with plenty of tank cars free of cost, if notified he desired same. That refrigeration not being compulsory, and the price made being F. O. B. New York, any extra charges for transportation, other than changes in the overland freight tariff, should be for Seller's account.

The arbitrators were advised in writing by the superintendent of transportation, U. S. Railroad Administration, Southern Pacific Lines, that shipment of coconut oil in barrels in ordinary box cars during July, August and September, 1918, was not refused by the railroad, provided the containers of the oil were in proper condition; also that no discrimination was exercised by the railroad between through shipments from the Orient of such oil and shipments originating on the Pacific Coast, provided the containers were in satisfactory condition. It was shown that during the months of July, August and September, 1918, the following amounts of coconut oil were shipped from San Francisco to points east of the Missouri River: Loaded in box cars, eight (8) cars; loaded in refrigerated cars, seventy-four (74) cars. That the coconut oil loaded in refrigerated cars was so shipped because the barrels in which it was contained were not in condition properly to retain the oil without this added protection. That the oil that was shipped in box cars was in better quality of barrels as indicated

by inspection before shipments were accepted, and it was considered that they were suitable barrels to transport the oil as otherwise they would not have been accepted for forwarding in ordinary box cars.

As regards certain letters filed by the Seller with the arbitrators from various firms in San Francisco, in which it was claimed that the railroad company had refused to accept shipments of coconut oil during the summer months for forwarding in barrels in ordinary box cars, no proof was submitted that the barrels in these particular lots were in a condition satisfactory to the railroad inspector.

Later information furnished the arbitrators shows that the barrels in some of these shipments were not in good condition and were refused shipment in ordinary box cars on that account.

Had the oil in question been shipped before July 1st presumably no difficulty would have arisen in regard to shipment in box cars on account of possible leakage. Not being able to ship prior to that time, Sellers had the choice of

(a) Furnishing containers satisfactory to the railroad inspector, or

(b) Finding tank cars and shipping in them, provided Buyer was notified in advance and agreed to accept delivery in tank cars instead of in barrels, or

(c) Shipping in barrels under refrigeration.

Seller without notifying Buyer and giving him an alternative, chose to ship under refrigeration.

The railroad tariff shows that refrigeration is a special service by the railroad and specifies that an extra charge is made therein for this service, which is not included in the regular overland freight rate, and hence this extra charge must be paid either by the shipper or the consignee in addition to the regular freight rate.

As Seller sold F. O. B. New York he was bound to deliver the oil there at contract price unless present overland freight tariff was changed, and it is not claimed that this was the case, or unless Buyer agreed to assume any extra charges for shipping in some special manner agreed to by him prior to shipment. Buyer cannot be held responsible in this case for the extra cost to Seller in shipping this oil from the Pacific Coast to New York without notifying Buyer and having an understanding in advance regarding payment of said extra cost.

Held, That as Seller sold F. O. B. New York, he was bound to deliver the oil there at contract price unless freight tariff effective at time of contract was changed, and Buyer is not required to pay for shipment under refrigeration. (San Francisco Chamber of Commerce Arbitration, 1919).

Rejection

The general rule in the business of importing is that rejection of goods by Buyer, if accepted by Seller, shall constitute delivery, i. e., Seller and Buyer by agreement thereby rescind the contract, the one being released from making any delivery thereunder and the other released of his obligation to take and pay for the goods.

Rejection Constitutes Delivery—Rejection, if accepted by Seller, shall constitute delivery. (Foreign Commerce Association, Rule 15).

Rejection Must Be for Cause—But the rejection must be for cause and the party making it must substantiate his adverse claims. If rejection be for alleged inferior quality, such inferior quality must be established by disinterested inspection and determination; or if made on the ground of delayed delivery, or failure to ship within the contract period, or insufficiency of documents, or any default of the party charged under the contract, such conditions as alleged must be substantiated and justified. The rule is different, however, when a contract specifies *Buyer's inspection and acceptance.* This has been held to be an *option sale,* conditioned upon the Buyer's inspection and acceptance of the goods. He may or may not be justified in objecting to the quality, but under such a clause he is the sole and final judge.

Inasmuch as the so-called rejection clause is one of the most important and far-reaching provisions of contracts the discussion thereof should be extensive and in the light of many awards of arbitrators on this vital point. Virtually every arbitrament involves a rejection. Occasionally a Buyer may demand an allowance on the price to be made by Seller, but usually a Buyer objecting to the quality of goods, time of shipment, insufficiency of documents, improper packing, or any other of the many causes of dispute, rejects the tender outright. If the rejection is uncontested, the contract under which the parties had been bound automatically is cancelled and neither party is obligated to perform further thereunder. But if the rejection is not accepted unconditionally by Seller, there is no rescission of the contract. This follows the rule of law that a contract cannot be rescinded by one party thereof. The aggrieved party may treat a breach of contract as cause for rescission but there must be recourse to some tribunal or authority higher than the mere will of the party. The aggrieved party may begin a legal action for damages arising from the breach, or he may follow ths custom of enlightened merchants and submit his dispute to the impartial judgment of arbitrators.

Rejection for Fraud, Deception and Gross Carelessness—While in the world of trade outright rejection is discouraged, fraud, deception or gross carelessness on the part of the Seller are grounds for outright rejection well recognized and generally accepted and applied in all trades, and arbitrators are quick to penalize a Seller guilty thereof.

Buyer's Option of Rejection or New Tender for Inferior Quality of California Beans—The California Bean Dealers Association Uniform California Bean contract is specific as to rejection for inferior quality. The California Bean Dealers Association established a fixed standard as to quality as follows:

> "CHOICE RECLEANED: To contain not less than 98 per cent sound merchantable beans and not over 2 per cent damaged, discolored or other beans, splits, adobe, or other foreign matter; and in no case more than 1 per cent damaged beans. (This standard shall be permanent and in no way altered from year to year, and all sales and shipments made thereunder must not vary therefrom in excess of 1 per cent)."

The same contract contains this clause:

> "If arbitrators find variation in excess of one (1) per cent from standards herein above named, buyer shall be entitled, within the time specified in findings, at his option, to outright rejection, another tender or such allowance as arbitrators may fix."

It will thus be seen that the Buyer has the option of outright rejection, another tender or an allowance to be fixed by arbitration. This is a departure from the "rejection constitutes delivery" clause in import contracts to this extent at least: If a buyer rejects goods tendered and his rejection be sustained by arbitrators, he is entitled to another tender if he so elects. The rule of the California Bean Dealers Association is that a buyer must elect his option immediately on notice of the award.

"Rejection Constitutes Delivery" Clause Not in Vegetable Oil Uniform Rules—This likewise is substantially the situation in the Vegetable Oil trade. Until the Vegetable Oil trade rules were made uniform by agreement between the New York Produce Exchange, the Interstate Cottonseed Crushers' Association and the Foreign Commerce Association of the Pacific Coast (May 23, 1920), Pacific Coast oil contracts contained the *rejection constitutes delivery* clause; but by the uniform rules jointly established by the three organizations

named herein, outright rejection is permitted only for a limited number of reasons.

Rejection of Vegetable Oil, if sustained by arbitration, does not release Seller from his contractual obligation, but he is bound to fulfill his contract.

Rejection of **Vegetable Oil** for failure to declare name of vessel was not sustained. (Foreign Commerce Association Arbitration No. 5, 1919, Page 100).

Rejection of Chinese **Ungraded Peanuts** because Seller did not give notice of arrival of goods until several weeks had elapsed was not sustained. (Importers and Exporters Association Arbitration No. 1, 1918, Page 105).

Rejection of Japanese **Beans** because Seller delayed tender of delivery order several weeks after vessel arrived was not sustained, Seller having shown that the delay was beyond his control, the vessel having been aground and her cargo subsequently discharged in a disorderly manner and remained in the custody of the underwriters. (Importers and Exporters Association Arbitration No. 6, Page 106).

Rejection of a delivery of **Walnut Meats** was sustained under an interpretation of a clause in the contract providing for Buyer's inspection and acceptance. (Foreign Commerce Association Arbitration No. 26, 1919, Page 37).

Rejection of **Vegetable Oil** to be delivered in oak and fir barrels mixed because not so tendered was not sustained, but Seller was directed to recooper a sufficient amount of the oil into oak barrels as to make the delivery 50 per cent in oak and 50 per cent in fir barrels. (Foreign Commerce Association Arbitration No. 5, 1919, Page 100).

Rejection by Buyer of a quantity of Kotenashi **Beans** on account of quality, accepted by Seller, was sustained, and Seller's attempt to make a new tender was disallowed because of an express limitation in the contract. (California Bean Dealers Association Arbitration No. 12, 1920, Page 250).

Rejection by Buyer of two tank cars **Soya Bean Oil** sold for June shipment from Pacific Coast on the ground that tender was not made in June was not sustained since contract covered June *shipment*, not June *tender*. (Foreign Commerce Association Arbitration No. 23, 1920, Page 194).

Rejection of a quantity of **Java Peanuts** on the ground that they were damaged by the presence of weevil was not sustained under

interpretation of a clause in the contract requiring Buyer to accept any or all portions of the goods damaged, with an allowance to be fixed by arbitration. (Foreign Commerce Association Arbitrations Nos. 21 and 21A, 1920, Page 77).

Rejection of a quantity of **Korean-Japanese Beans** because of insufficiency of inspection certificate was not sustained, Buyer having paid for the goods and claimed an allowance in accordance with Rule 13. (Foreign Commerce Association Arbitration No. 25, 1920, Page 52).

Rejection of Chinese-Shelled **Peanuts** on the ground of late shipment was not sustained when it was shown that Buyer had cancelled as to a portion of the shipment at time of notice of delay in shipment and had consented to the late shipment of the remainder of the quantity under contract. (San Francisco Chamber of Commerce Arbitration, 1920, Page 215).

Rejection of a quantity of **Beans** for delayed shipment under a *prompt* shipment provision in the contract was not sustained because shipping instructions were not received until 5:51 P. M., October 11th; October 12th was a legal holiday and October 13th was Sunday, the arbitrators holding that the ten-day period allowed for *prompt* shipment began to operate October 14th and shipment on October 24th complied with *prompt* shipment requirement. (California Bean Dealers Association Arbitration No. 16, 1918, Page 198).

Rejection of a quantity of **Beans** for delayed shipment under a contract calling for *immediate* shipment was sustained, shipment not having been made *immediate*, i. e. within five full business days, under the terms of the California Bean Dealers Association Uniform Contract. (California Bean Dealers Association Arbitration No. 19, 1918, Page 33).

Rejection of a quantity of **Beans** bought through a broker on the ground that Seller did not comply with the time of shipment clause was sustained, and arbitrators held that the Seller was wholly responsible for the acts of the broker, within the scope of his authority, and as the broker had failed properly to confirm *immediate* shipment, the fault was Seller's and not Buyer's. (California Bean Dealers Association Arbitration No. 19, 1918, Page 33).

Rejection of Chinese **Shelled Peanuts** purchased for January-February shipment from the Orient because the vessel on which shipped did not actually sail from Kobe until March 15th, was not sustained, Seller having adduced proof that the vessel had been scheduled to sail on February 27th, but was delayed on account of engine trouble. (Foreign Commerce Association Arbitration No. 9, 1920, Page 193).

Rejection of Chinese **Shelled Peanuts** purchased under a contract specifying *"usual packing"*, on the ground that the tender was of peanuts packed in bags weighing 180 pounds, was not sustained, the arbitrators holding that when shipped from Chinese points Peanuts packed 100 pounds to the bag are no more *"usual"* than other weights, namely, 200, 180, 160 and 100 pounds. But Seller was required to pay all expenses of repacking the peanuts into 100 pound bags if Buyer so required. (Foreign Commerce Association Arbitration No. 13, 1920, Page 264).

Rejection of Chinese **Shelled Peanuts** not accepted by Seller nor acted upon by him for a period of twelve days was not sustained, the arbitrators holding that it was clearly the Buyer's duty to have strengthened his position properly by insisting upon a prompt specific acceptance or refusal of rejection. (Foreign Commerce Association Arbitration No. 13, 1920, Page 264).

Rejection of Chinese **Shelled Peanuts** purchased C. I. F. Seattle on a contract calling for January shipment from Hongkong because the steamer on which shipment was made did not arrive at Hongkong until February 9th and sailed from there about February 13th, was not sustained, the bill of lading being dated in January and Buyer failing to submit proof of fraud on the part of Seller or his supplier in connection with the date of bill of lading, nor did he allege any such fraud or collusion with the steamship company. (Foreign Commerce Association Arbitration No. 14, 1920, Page 193).

Rejection of **Dried Fruit** under contract calling for shipment *"first half October"* on the ground that vessel did not sail from San Francisco until October 16th, was not sustained, Seller having shown that vessel was actually scheduled to sail October 14th and that her departure was delayed by congestion of cars and inability to complete loading of cargo on advertised sailing date; also that bill of lading was dated October 14th. (Dried Fruit Association of California Arbitration No. 228, 1914, Page 189).

Claim for rejection (and repayment) of 500 bags of imported **Beans** under a contract calling for 1,500 bags on the ground that Seller had delayed delivery of the 500-bag lot was not sustained for the reason that Buyer had expressly declared he was in no hurry for delivery at the time the goods arrived at port of entry. (California Bean Dealers Association Arbitration No. 17, 1918, Page 103).

Rejection of two shipments of Philippine whole **Coconuts,** sold for August shipment from Manila, under C. I. F. terms, the contract

calling for "5 per cent of rottage for the account of Seller," on the ground that virtually the entire first shipment arrived rotten and that the subsequent shipment of a separable lot was not made in August, was not sustained, but Buyer was required to take delivery of a small portion of the nuts found to be sound, and to pay for 5 per cent expressly covered by the "rottage" clause. It was further held that the subsequent shipment was justified by reason of the failure of the first carrier to take all the cargo tendered. (Foreign Commerce Association Arbitration Nos. 33 and 33A, 1921, Page 205).

Rejection of a quantity of Japanese **Kotenashi Beans** sold for shipment "not later than December–January–February from the Orient" on the ground that shipment was not made from Yokohama until March 3rd, the date the vessel cleared for Seattle, was not sustained on this ground, Seller having shown that the goods were shipped February 23rd from Otaru, Japan, and transhipped at Yokohama into direct steamer for Seattle. (California Bean Dealers Association Arbitration No. 15, 1919, Page 191).

Rejection of a quantity of Japanese **Kotenashi Beans** on the ground that tender of delivery order was unduly delayed after arrival of goods was sustained, Seller having neglected to make tender until seventeen (17) business days after arrival, vessel having arrived March 26th and tender being made April 15th, and there was no unavoidable contingency contributing to the delay. (California Bean Dealers Association Arbitration No. 15, 1919, Page 191).

Rejection of a quantity of **Dried Fruit** sold under Uniform Water Shipment Dried Fruit Contract (1912) calling for August–September shipment on the ground that Buyer, having consented to an extension of time of shipment to October 9th and claiming he was not obligated to take delivery when vessel scheduled for October 9th was withdrawn, was not sustained and Seller was justified in shipping October 12th on the *"first available steamer."* (Dried Fruit Association of California Arbitration No. 109, 1912, Page 188).

Rejection of a quantity of **Dried Fruit** sold under contract calling for August–September shipment from Pacific Coast on the ground that it was not shipped until October 1st was sustained, and Seller's claim that he was prevented from making shipment within contract time by reason of a shortage in cars was rejected, since he had failed to notify Buyer of the alleged shortage in rail equipment prior to the last shipping date under the contract. (Dried Fruit Association of California Arbitration No. 2, 1919, Page 191).

Rejection of a quantity of **Dried Fruit** sold for October shipment on the grounds, first, that Seller shipped a portion of the goods under other than Buyer's labels as specified, and, second, that October bill of lading was not obtainable, was not sustained upon a showing that Buyer did not supply his boxing specifications until October 4th, 19th and 22nd, respectively, and consequently labels could not be obtained in time to permit labeling of all the boxes, and, also, that the failure to obtain October bill of lading was due to Buyer's rejection of the shipment, arbitrators citing the rule of law that a party who stipulates that another shall do a certain thing, thereby impliedly promises that he will himself do nothing which will hinder or obstruct that other in doing that thing. (Dried Fruit Association of California Arbitration No. 14, 1920, Page 187).

Rejection of **Rice** sold under a C. I. F. contract specifying shipment "Hongkong to Havana," on the ground that the Rice was not shipped direct but was transshipped at San Francisco to Havana, was not sustained, the contract being silent as to whether shipment was direct or indirect, as under the C. I. F. term, Seller had the option of transshipment. (Rice Association of California Arbitration No. 28, 1920, Page 182).

Rejection of **Rice** sold under a contract C. I. F. San Francisco from Hongkong, on the ground that 671 bags ex 250 tons arrived damaged, was not sustained. The contract contained a printed clause that *goods arriving damaged being for Seller's account, but will constitute a portion of the delivery*. The stipulation "C. I. F." was typewritten and therefore abrogated the printed clause. (Rice Association of California Arbitration No. 14, 1920, Affirmed on Appeal to the San Francisco Chamber of Commerce, Page 58).

Rejection of a quantity of Manchurian Bleached **Walnuts** on the ground that they did not comply with specification calling for No. 1 Bleached, 90 per cent Good Crack, was held to be a valid rejection, and Seller was relieved of making a new tender under Rule 15 of the Foreign Commerce Association, he having declared a specific lot and there having been no showing of fraud, misrepresentation or bad faith on the part of Seller. (Foreign Commerce Association Arbitration No. 35, 1921, and No. 35-A, 1921. See also Dissenting Opinion, Page 156).

Rejection by Buyer of **Manchurian Walnuts,** accepted by Seller, was sustained, and Buyer's demand for a new tender was not allowed under Rule 15 of the Foreign Commerce Association, he having failed to take delivery and demand an allowance, sufficient to make him whole,

as provided by Rule 13. (Foreign Commerce Association Arbitration No. 43, 1922, Page 162).

Rejection by Buyer of a second tender of **Manchurian Walnuts** on the ground that the tender was unreasonably delayed, the delay having been eleven days, during which time the Seller remained silent as to his intentions, was sustained, arbitrators holding that the option of a retender is favorable to Seller and he must therefore take the ordinary commercial steps to preserve his rights. (Foreign Commerce Association Arbitration No. 44, 1922, Page 243).

Rejection of **Peanut Oil** on the ground that Seller had failed to make tender to a designated agent prior to shipment was sustained. (Foreign Commerce Association Arbitration No. 23, 1920, Page 250).

Rejection of Kotenashi **Beans** purchased "spot" on the ground that there had been an unreasonable delay in tendering documents, was not sustained, it being held that where the contract was silent as to time of delivery Buyer could not cancel without demanding delivery, nor could Seller cancel until he has made proper tender and same has been refused. (San Francisco Chamber of Commerce Arbitration, 1919, Page 252).

Rejection of a shipment of Red Mexican **Beans** sold under the terms of the so-called Water Contract (1919) of the California Bean Dealers Association on the ground that the certificate covering the shipment was made on samples taken from the car at interior loading point and not on the dock at San Francisco was sustained, it being held that the contract provided for goods F. O. B. dock for steamer, and that the point of inspection was on the dock at San Francisco and not on the car in the interior. (California Bean Dealers Association Arbitration No. 26, 1922, Page 45).

Rejection of **Rice** sold for February-March-April shipment on the ground that the vessel did not arrive at Hong Kong, the port of origin, until May 4th and did not leave until May 7th, was not sustained, Seller having shown that he had engaged his freight space January 9th, that the vessel was scheduled to leave in April and that the rice was delivered to the carrier and a bill of lading issued April 20th, arbitrators stating that the date of bill of lading is accepted by the trade as date of shipment, unless fraud is shown. (San Francisco Chamber of Commerce Arbitration, 1920, Page 74).

"Rejection Constitutes Delivery" Clause—When Rule Is Operative—Absence of Fraud on Seller's Part—Buyer Could Be

Made Whole by Allowance—A sold B a quantity of **Manchurian Walnuts,** 1920 crop, bleached, 1⅛ or better in size and to crack 90 per cent sound, April shipment from the Orient. The price was on a C. I. F. basis. The contract was executed as to part of the goods. On June 1st there remained 800 100-pound bags to be delivered, the Buyer having extended the time of shipment for this remainder. The goods arrived at San Francisco per S. S. "Taiyo Maru", Seller having declared this lot to Buyer May 27, 1921. On or about June 28th Buyer was given a sampling order for 300 bags, and on the 29th he refused to accept the goods as being an improper tender under the contract because the "quality, size and description" did not meet contract requirements, at the same time insisting upon delivery of the goods sold and purchased. On July 1st Seller tendered 800 bags ex the S. S. "Taiyo Maru", which Buyer refused to consider as being a tender. On July 20th Seller advised Buyer of his acceptance of the rejection, claiming cancellation of the contract by virtue of Rule 15 of the Foreign Commerce Association. The submission to arbitration resulted.

The record shows that Seller bought by cable No. 1 Manchurian Bleached Walnuts, 90 per cent sound crack, from his supplier in the Orient; that his supplier made shipment, and obtained a Surveyor's Certificate as to quality, the certificate showing good crack at time of shipment to be 91 per cent but omitting the term "bleached"; that Seller declared the name of the vessel to the Buyer; that he made a tender of the goods and that Buyer contended that the tender was not a good tender.

The Arbitrators said:

"This is essentially a C. I. F. contract, for shipment from the Orient, except Seller assumes the risk of quality and weights until delivery to Buyer at San Francisco. Nevertheless, the trade custom is very clear in that when a Seller in good faith imports from overseas goods which at time of shipment were of contract quality, and Buyer exercises his option of rejecting, then Seller is relieved from having to replace with other goods.

"Under the rules Buyer had two options—first, to reject the goods outright without recourse on the Seller (Rule 15), or second, to accept the goods with an allowance (Rule 13). Buyer's failure to accept the tender was tantamount to a rejection, and the rule *rejection if accepted by Seller shall constitute delivery* automatically operates.

"Arbitrators have called in experts in the walnut trade and examined a number of type samples of bleached Manchurian Walnuts. These type samples showed variation in color and appearance of different

deliveries of bleached nuts. The nuts tendered ex "Taiyo Maru" had apparently not been properly bleached, but the majority arbitrators are of the opinion that they were bought and tendered by Seller in good faith. These nuts even though poorly bleached, or simply washed, were not so substantially different from contract quality, that had Buyer wanted to take delivery under the contract, he could have had them re-bleached and hand-picked at a reasonable cost, such expenses, together with allowance for being below 90 per cent good crack certainly being for Seller's account. The Buyer, however, failed to take delivery and thereby in effect rejecting the nuts, made Rule 15 operative.

"The arbitrators believe that Rule 15 must be sustained, unless there is evidence—

"(A) That the goods tendered are so different from contract quality that Buyer cannot reasonably be made whole by an allowance, or

"(B) Of fraud, misrepresentation or bad faith on the part of the Seller.

"The majority arbitrators are of the opinion that the record clearly shows that Seller acted in entire good faith in making shipment from overseas and that his tender was likewise in good faith. The majority arbitrators also are of the opinion that there was a rejection and that, under Rule 15 of the Foreign Commerce Association such rejection, when accepted by Seller, constitutes a termination of the contract.

Held, That Seller did tender 800 bags of walnuts, that the same were rejected and upon acceptance of rejection, Seller is not obligated to make a new tender but the contract is terminated. (Foreign Commerce Association Arbitration No. 35, 1921.)

Dissenting Arbitrator's Opinion—One of the arbitrators dissented, submitting his reasons therefor, as follows:

"It is necessary for the Seller to tender the merchandise sold, and not some other merchandise of a different kind, condition and quality.

"Arbitrators were unanimous in their findings that the Seller assumed the risk of quality and weight on delivery.

"The contract calls for No. 1 Manchurian Walnuts, bleached 1⅛ or better in size, to crack 90 per cent sound, 1920 crop. Certificates of inspection issued in Shanghai set forth that the walnuts were 91 per cent good crack at time of shipment, whereas Certificate of the San Francisco Chamber of Commerce covering a sample of the walnuts submitted by Seller show them to be, approximately, 77 per cent good crack upon arrival.

"Upon inquiry by the arbitrators as to this difference two reputable experts stated positively that the walnuts were of approximately the same quality when they arrived in San Francisco as when they left Shanghai. The difference in quality as set forth in the Certificates issued in Shanghai and the quality as determined by the Inspector of the San Francisco Chamber of Commerce can only be accounted for by gross negligence, or fraud, in the description of the nuts as shown in Shanghai Certificates. The correctness of the San Francisco Chamber of Commerce Certificate has not been questioned as regards quality. Neither the Shanghai Certificates or the Certificate of San Francisco Chamber of Commerce describe the walnuts as 'bleached', and samples placed before the arbitrators were in my opinion not "bleached". It was suggested that the nuts may have been put through a weak solution; however, the other arbitrators did not consider them properly 'bleached' if indeed they were bleached at all. The opinion of the experts was that they were not bleached and the Seller, himself, admitted to a representative of the Foreign Commerce Association that only a portion of them were 'bleached'.

"To hold the Seller has discharged his obligation by tendering 'unbleached' nuts of about 77 per cent good crack when the contract calls for 'bleached' nuts 90 per cent good crack, or that the Buyer is obligated to accept such a tender and claim upon Seller for an allowance, is inconsistent. The Seller is obligated to supply 'bleached' nuts of the crack called for.

"Buyer cannot be penalized for any gross negligence, or fraud on the part of Seller or his supplier. Seller is unquestionably responsible to Buyer for his own and his supplier's acts, or failure to act, insofar as same affects the contract. Responsibility for negligence or fraud cannot be saddled on the Buyer under the provision in the contract that rejection shall constitute delivery. The Seller must supply what he has sold, exercising such care as to see that Buyer receives what he has purchased and protect him from gross negligence, or fraud, on the part of Seller or his supplier, who is unknown to Buyer.

"If the award of the arbitrators is sound in its reasoning the Seller could tender 'unbleached' walnuts 15 per cent good crack and the Buyer, upon refusing to accept same as a tender under the contract, would be held to have rejected the nuts, and the Seller, because of such rejection, would be relieved of supplying what he had sold.

"All the arbitrators were agreed that the Seller assumed the risk of quality and weights on delivery. No custom that may prevail can override the express conditions of the contract in this respect. The

Shanghai Certificates, whether fraudulent or otherwise, have no relevancy in determining quality, if the Seller assumes the risk of quality and weights on delivery, as the arbitrators found in their award and in which I concur. It was, therefore, incumbent upon the Seller to know what the quality was on delivery, and position himself to deliver nuts of the kind and quality sold. In default thereof, he cannot escape his obligation by tendering nuts different in kind and quality to those sold.

"Assuming, for the sake of argument, that this was a C. I. F. sale and with no responsibility on the part of Seller to deliver quality and weight at destination but only to deliver walnuts to the exporting vessel of the kind and quality sold, obtaining the usual documents in support thereof, the Certificate of Inspection issued in Shanghai would very strongly, if not clearly evidence, in the light of the San Francisco Certificate and testimony of the experts, to the effect that the nuts could not materially deteriorate in transit, that a fraud had been perpetrated upon the Seller and that the quality of nuts described in the Shanghai Certificate had never been shipped.

"Do the arbitrators, in their award, contend that, if a fraud had been perpetrated on the supplier in Shanghai and same had been ascertained by the Buyer before merchandise had been tendered to him, the rejection of such an alleged tender would relieve him from his obligation to supply the nuts he took the risk of supplying under the contract?

"However, it is not necessary to look upon this as a C. I. F. transaction. The makers of the award have agreed with me that the Seller assumed the risk of quality and weight on delivery. Therefore, to require Seller to discharge his contract obligation in this respect, it was necessary for him to tender nuts of the quality he sold. To hold otherwise is to disregard the contract and go outside of it entirely.

"Therefore, I hold that the tender by Seller, being an improper one, the Buyer is justified in insisting upon and is entitled to a valid tender of No. 1 Manchurian Bleached Walnuts, 1⅛ or better in size to crack 90 per cent sound, 1920 crop.

Arbitrators on Appeal Sustain Award—From the majority award, the Buyer appealed, alleging that the rule had been erroneously interpreted by the majority arbitrators and asserting that the minority opinion should prevail. The Appeal Board sustained and affirmed the majority award, as follows:

"This matter, involving a tender of 800 bags No. 1 Manchurian Walnuts, Bleached, 1920 crop, $1\frac{1}{8}$ or better in size and to crack 90 per cent sound, comes before the arbitrators on appeal, the Buyer claiming that the majority arbitrators had erred in their award, dated at San Francisco August 12, 1921. There was a minority opinion filed in the original hearing, the arbitrator holding that the majority was in error.

"The facts of the transaction are fully stated in the original finding and award. The parties hereto have submitted additional written arguments to these arbitrators, which, together with the original record, have all been presented to and considered by the arbitrators on appeal.

"The prevailing opinion held that, under the rules, Buyer had the option of (1) to reject the goods outright without recourse on the Seller (Rule 15); or (2) to accept the goods with an allowance (Rule 13).

"After a most careful consideration of the record, the arbitrators on appeal are of the unanimous opinion that the prevailing opinion in the original arbitration is sound; that the rules governing the contract, particularly Rules 13 and 15, reach a fundamental principle involved in the importing business, namely, that goods brought overseas in good faith, by an importer who fortifies himself by a declaration of the lot, shall be accepted by a buyer, if merchantable, and if off-grade shall be subject to an allowance. Rule 13 affords a buyer ample protection in that it requires a Seller to give bond or a bank guarantee for the repayment of any allowance that may be made by arbitration. Failing to take advantage of Rule 13, a buyer, as in this case, cannot demand another tender if a Seller relies upon Rule 15. In the opinion of the arbitrators on appeal, the Seller did make a tender of the specific lot declared to Buyer, that Buyer did reject the tender and that Seller did accept the rejection, Buyer thereby being estopped from maintaining any claim whatsoever against the Seller. To put the matter in another light, Buyer had an election of remedies. Having exercised one and disregarded another, he cannot thereafter plead his own act against Seller.

"The record indicates that Seller acted in good faith, and there is not the slightest evidence of fraud or misrepresentation on his part.

"The minority arbitrator in the original matter has argued with much potency that the view taken by the majority was to *disregard the contract and go outside of it entirely.* But the arbitrators on appeal are of the unanimous opinion that the rules covering a contract are as

much a part of it and within its four corners as any written provision thereof so long as the written provisions do not abrogate those printed.

"Therefore, the arbitrators on appeal unanimously make the following findings and award:

"That the majority award in the original matter between Seller and Buyer, is affirmed and approved and the same is hereby adopted as the finding and award on appeal, to-wit: That Seller did tender 800 bags of walnuts to Buyer and that the same were rejected, and that upon such rejection and acceptance thereof Seller is not obligated to make a new tender but the contract is terminated." (Foreign Commerce Association Arbitration No. 35-A, 1921.)

Allowance, Refused by Buyer, Set Aside—New Tender Not Required Under Rejection Clause—First Award Rescinded— A Pacific Coast importer sold a quantity of **Peanuts** to a Chicago merchant. Upon consideration by arbitrators it was decided that the peanuts were not a good delivery for size but were merchantable, and the arbitrators made an allowance of 1½ cents a pound for the difference in size and quality. Subsequent to the publication of the award, the Buyer claimed that he rejected this lot of peanuts and desired a new tender. Seller accepted the rejection.

Held, That Buyer having rejected the Peanuts, which rejection, under the terms of the contract, constitutes delivery and no other tender is required of Seller. In accordance herewith, the original award is rescinded. (San Francisco Chamber of Commerce Arbitration, 1920).

Rejection Constitutes Delivery—Buyer Not Entitled to New Tender—A Pacific Coast importer sold to a San Francisco merchant a quantity of **Manchurian Walnuts,** and the Buyer rejected 500 bags of one delivery on the ground that the nuts were under size specified in the contract, and demanded a new tender. The contract was the Uniform Contract of the Foreign Commerce Association and its rules governed. The Seller accepted the rejection, contesting the right of the Buyer to demand a new tender.

Held, That under Rule 15 of the Foreign Commerce Association, rejection, if accepted by Seller, constitutes delivery. The walnuts, being merchantable, the Buyer had the option, under Rule 13, of taking delivery and claiming for an allowance sufficient to make him whole. Having rejected the goods he is not entitled to a second tender. (Foreign Commerce Association Arbitration No. 43, 1922).

Reversal for Concealment of Facts

Editor's Note. — While the rules of arbitration of various commercial organizations contemplate only one submission and the Findings and Award of arbitrators are considered final thereunder, occasionally it is found necessary by arbitrators peremptorily to reopen a case once decided on the request of one of the parties, particularly if there is evidence of a concealment of facts by the adverse party on the first hearing. While this is provided for in arbitration rules of various associations, it will be noted that such procedure is not valid in law unless it has been established by by-law or rules of the organization before which the parties appear or to which they submit. Under a statutory form of arbitration or a common law arbitration, arbitrators lose their jurisdiction once they have made their findings and award, and a case once decided may be reopened only by agreement of the parties thereto. An example of a complete reversal by arbitrators, acting under the by-laws and rules of an association, is appended for the information of persons who may be the victims of such concealment, tantamount to fraud, on the part of a party to a dispute.

Arbitrators Acting Under Association Rules Penalize Party for Sharp Practices—A, a California Seller, sold to B, a Texas Buyer, a small quantity of **Blackeye Beans.** On arrival of the goods B rejected, alleging that the beans were infected with weevil. Upon the matter being submitted to arbitration, B caused an official sample to be sent to the California Bean Dealers Association of California, and rested his case solely on the question of quality to be determined by the arbitrators from an examination of such sample. A raised the point that claim as to quality was not made within three (3) full business days after arrival of shipment, as provided by the Uniform Contract, and therefore B was not entitled to the decision. He set forth that the car arrived November 15th and inferred that the alleged weevily beans were not reported until December 13th. For the reason that B did not use due diligence in reporting the condition of the beans to Seller, according to the evidence submitted, the arbitrators held that he must take delivery thereof. Subsequently it developed that B had acted promptly in the matter, and on November 16th, the day after the arrival of the car, had sent a telegram to A informing him of the condition of the beans and asking disposition. In a formal protest to the arbitrators, B stated that he had not included a copy of the telegram in his submission for the reason that the question of such delay on his

part was not anticipated by him in view of the telegram itself. In a communication addressed to A, the Seller, the arbitrators said:

> "Knowing as you must have, from the receipt of the telegram in question, that the finding was unjust and should have been solely on the quality of the beans, you should have at once called the arbitrators' attention to the fact. We are sending B a copy of this letter, and are hereby notifying you both that the arbitrators reopened the findings in this case, and will reconsider it in the light of the present evidence, filing supplemental findings in connection therewith."

Subsequently, a rehearing of the case was had, the arbitrators stating in supplemental findings and award:

> "This case has been reopened by the arbitrators owing to the fact that the original decision was predicated upon the only information the arbitrators had at that time, viz.: That the Buyer had been guilty of negligence in not promptly notifying the Seller of the condition of the shipment on arrival. It having been shown conclusively to the arbitrators that proper notification was sent on the day following the arrival of the shipment, and that therefore the matter should be considered on the question of quality only, the arbitrators having made a full and careful examination of the samples submitted, are unanimous in the opinion that the weevily condition of the beans warrants an outright rejection by Buyer." (California Bean Dealers Association Arbitration No. 10, 1919).

Sales on Sample

The general rule on sales subject to sample is that quality of goods must be equal to or better than sample submitted. (Foreign Commerce Association Rule No. 29; California Bean Dealers Association, Uniform California Bean Contract; Dried Fruit Association of California, Canner's League of California Contract Provisions).

When merchandise is sold on regular grades and types established by these Rules, or when sold with a specific guarantee, or when sold on sample, Buyer may reject if the merchandise does not conform to contract requirements. When spot lots are sold on sample, permitting of the immediate verification of the actual merchandise by the Buyer, and selling sample is not expressly guaranteed to represent the merchandise, there shall be no sale if goods do not conform to sale requirements. In all other cases, delivery shall be taken by purchaser if merchandise be good merchantable, at a proper allowance to be fixed by arbitration. (Foreign Commerce Association Rule No. 268).

Where contract provided that sample of **Rice** was subject to Buyer's approval, his disapproval of the sample submitted by Seller released Seller of obligation to make any other tender. (Rice Association of California Arbitration No. 5-B, 1921, Page 167).

Where contract provides for shipment November 24th to 26th and that Seller shall submit sample of **Rice** for Buyer's approval on or before November 23rd, Seller submitted sample on November 26th, making it impossible to effect shipment on that date. Seller was declared in default, and the penalty assessed was the difference between the sales price and the market price on the date of default. (Rice Association of California Arbitration No. 5, 1921, Page 167).

When there has been carelessness on the part of both Buyer and Seller in the identification of sales sample, identical sample numbers having been given to two lots of **Rice,** damages resulting to Buyer were minimized by arbitrators. (San Francisco Chamber of Commerce Arbitration, 1919, Page 166).

When Seller submits a sample of **Mustard Seed** and thereafter sends Buyer a contract in which Buyer interpelates the words *and to be the same as sample* after the description of the mustard seed, and Seller fails to object to the reference to sample, the delivery must conform to sample, which controls the grade. But outright rejection will not be permitted when contract stipulates that all goods shall be

taken at an allowance. (San Francisco Chamber of Commerce Arbitration, 1918, Page 168).

When **Dried Fruit** is sold on sample and Buyer rejects the goods, arbitrators will consider only the sample upon which the sale was confirmed and the rejection based. (Dried Fruit Association of California Arbitration No. 175, 1914, Page 170).

When a contract covering **Beans** specifies *season's average* and the Seller advised Buyer in his message of confirmation that the beans were *like sample expressed,* Buyer is entitled to delivery of a car of season's average beans, the description and not the sample controlling the contract. (California Bean Dealers Association Arbitration No. 23, 1919, Page 171).

Careless Identification of Rice Samples— Duplication of Numbers for Different Grades—Damages for Buyer Reduced for Laches—A sold to B 1,600 bags Coated California Japan **Rice** at $5.70 per 100 lbs. net, delivery to be F. O. B. Sacramento or San Francisco.

The sale was made under two contracts—one for 1,000 pockets and one for 600 pockets of 100 lbs. each, and in each case the grade was specified as "Lot No. 160." The terms specified *Chamber of Commerce inspection certificate to be issued to Buyer specifying equal to type No. 160 now held by them,* in the 1,000 pocket contract, and same terms in the 600 pocket contract except "Buyer" was substituted for the last word "them."

Buyer claimed that the rice tendered was not equal in quality to a certain type No. 160 which he had purchased under two previous contracts and of which he held sample and that he expected delivery to be made against that sample. Buyer refused to accept the delivery tendered and claimed damages in the sum of $4,704. Seller claims that he had not contracted to furnish rice as per type No. 160 sold Buyer previously, as that particular lot of rice had been exhausted and he had so informed the Buyer on April 9th, when asked by him for a quotation on an additional quantity of this type.

Seller claims that Lot No. 160 in the contract referred to another certain lot of rice which happened to have the same number and that he had sent Buyer a sample of this lot with the quotation upon which sale was based, and that this rice is not equal in quality to the type No. 160 previously sold and was sold at a lower price than that type could be furnished. Seller stated Buyer claimed he did not receive this sample, which Seller cannot understand, as the sample was wrapped with the quotations.

Seller claimed that Buyer purchased this rice on sample and that he purchased rice equal in quality to sample submitted with quotations on May 14th and that the No. 160 designated this type only.

Held, That while both parties acted in good faith in this transaction, both made mistakes in the methods of handling and identification of samples. Buyer should, in accordance with usual custom, have demanded a sample, even though it were a duplicate one, of the rice quoted him as sample No. 160, in order to make sure that the rice he thought he was buying was equal in quality to the previous sample No. 160, which he had previously bought. Seller, on the other hand, knowing that Buyer held a previous sample No. 160 of a different quality from that he understood he was to furnish in this sale, should have specified in quotation and contract that "lot No. 160" was as per sample submitted or was not as per the original sample No. 160 used in a previous sale, as he knew inspection certificate was to be furnished that the goods delivered were to be equal to type No. 160.

Buyer had sold this rice in Cuba for $6.50 per 100 lbs. and the net cost to him of the rice at Sacramento would have been $5.56 per 100 lbs., which would have left him a profit of $1,504, if delivery had been made by Seller.

Buyer testified that he would have to pay $2,000 to his Cuban purchaser as damages for non-fulfillment of his contract, thus making a total loss to him of $3,504 on the transaction.

We decide this case in favor of Buyer and award to him the sum of $2,504 as damages, and that payment to him by Seller of said sum shall constitute full settlement of all claims in this case. We have deducted $1,000 from the total damages Buyer shows he would sustain, as he did not handle the sampling of this rice transaction in the customary way. We feel that he thought he was to receive rice equal in quality to the original sample No. 160 but the low price quoted, according to current market, should have caused him to make sure he would receive the quality of rice he expected to buy. We decide that the 1,600 pockets of rice in question are to be retained by Seller. (San Francisco Chamber of Commerce Arbitration, 1919).

When Sample Disapproved by Buyer, Seller Not Obliged to Make Other Tender—A California rice mill sold to a San Francisco exporter 500 pockets No. 1 California Japan Brown **Rice,** sample to be submitted immediately and subject to Buyer's approval of sample, which was to be submitted November 23rd. The sales memorandum was dated November 23rd and the sample was not submitted to Buyer

until November 26th. Buyer rejected the sample, claiming that quality was inferior to grade described, and Seller did not submit a new sample. Buyer demanded delivery of the rice and Seller claimed that the sale was subject to Buyer's approval of a specific sample and Buyer having disapproved the sample, the contract was cancelled.

Held, That the Seller, in submitting a sample which was disapproved by Buyer, fulfilled his obligation under the contract and he is not required to deliver any Rice after disapproval of sample. (Rice Association of California Arbitration No. 5-B, 1921).

Sample Sent by Seller Is Part of Contract Terms—Buyer Not Entitled to Reject—Allowance Made for Inferior Grade—A California importer sold to a Chicago packer 50 tons Chinese **Mustard Seed,** \$9.00 per 100 pounds, shipment from the Orient during November-December-January, Seller's option. The original offer was made at 9½c by letter dated November 1, 1918, and enclosed therewith was a sample of Chinese Mustard Seed. Buyer on November 9, 1918, after examining the sample submitted, wired an offer of 9c per lb. which offer was accepted by Seller in telegram of November 11th, and on November 12th Seller sent Buyer a written contract for his signature. On November 22nd, Buyer returned to Seller one copy of the contract, but, understanding that the sale was based upon the sample submitted and to make clear that his purchase was made on this sample, he inserted in the contract the following clause: *And to be same as sample,* at the same time notifying Seller, in letter of November 22nd, that he had entered this clause in the contract and if this was not agreeable to Seller he would consider the order cancelled. No reply was received from Seller offering objection to that clause. Seller stated to the arbitrators that he had not intended to sell as per sample and had only sent it as a type sample, but as he had already ordered the mustard seed in Japan and could not cancel the order there, he decided when he received the contract back and noted the insertion of this clause mentioned, "to take a chance" that the seed shipped would be up to that sample.

When the seed arrived about March 7, 1919, Buyer on that date wired Seller that he rejected the shipment because it was not equal to sample. The questions to be decided by the arbitrators were:

"First—Was the sale made on the contract of November 11, 1918, or on the original telegrams and letters exchanged?

"Second—Was this sale made as per sample or only as a fair average quality of the season?

"Third—Is the mustard seed in question up to contract in quality and, if not, is Buyer entitled to reject the shipment or is he entitled only to an allowance and, if the latter, what allowance?"

Held, That this sale was made on the contract of November 11, 1918, and that the sale was not completed until said contract was signed and accepted. We decided that this sale was made with the condition that the goods delivered were to be same as sample and that the sample submitted by Buyer was the one referred to in the contract, no evidence having been offered controverting affidavits submitted that said sample was the one furnished by Seller with his original offer. Seller was given by Buyer the right to object to this insertion of the clause *and to be same as sample* and failing to do so he was obligated to furnish goods equal to the sample referred to. After carefully comparing said sample with the average sample of the shipment in question, we decide that the mustard seed delivered is not the same as sample and is inferior in quality.

We decide, however, that Buyer is not entitled, under paragraph 2 on back of the contract, to reject this shipment on account of any difference in selection or quality, as he had notice when he signed the contract that all the conditions stated on the reverse side thereof were made a part of the contract.

We decide that Buyer is entitled to a fair allowance on account of inferior quality of Mustard Seed delivered as compared with the sample referred to in the contract, which allowance we fix at two and one-half (2½c) per pound for the entire shipment in question and we decide that Seller shall refund to Buyer that amount. (San Francisco Chamber of Commerce Arbitration, 1919.)

When Quality Is Determinable by Sample—A sold B a quantity of No. 1 **Recleaned Red Kidney Beans** similar to a sample marked No. 9, reference to the sample being incorporated in the contract. B claimed that he did not understand in signing the contract that delivery was to be other than No. 1 Recleaned Beans, and that sample No. 9 simply represented the type of beans he might expect to receive.

Held, That A took the precaution to forward this sample and make it a part of the contract, and, therefore, B should have awaited receipt of the sample, or failing to receive it, should have demanded a new sample before signing the contract. That A's position that a No. 1 Recleaned Bean is of a lower grade than Choice Recleaned is sub-

stantiated by a well defined custom of the trade. That B did not show due diligence before signing the contract in which a clause was incorporated reading "similar to sample No. 9." (California Bean Dealers Association Arbitration No. 20, 1919).

Sales Sample Governs Delivery—A sold B a quantity of **Dried Fruit** on sample under the following circumstances: Buyer's representative examined certain boxes of fruit on Seller's premises and made the purchase, withdrawing from the large sample a sufficient quantity to show to his principal, who confirmed the sale and executed a contract. The samples as drawn were then used for comparison with the goods delivered, and Buyer thereupon rejected. The Buyer requested that the arbitrators compare the goods not only with the sample submitted but with the original sample in Seller's possession from which this sample was drawn.

Held, That Buyer was not entitled to any other sample than that upon which the sale was confirmed and the rejection based. (Dried Fruit Association of California Arbitration No. 175, 1914).

Misbranding Goods Sold on Sample—In examining the samples, the arbitrators discovered that the goods had been misbranded in that Buyer labelled them for shipment "Northern California Royal Apricots." In their findings the arbitrators condemn this misbranding in the following language:

"In truth and in fact the goods are not 'Northern' and a part of the shipment is made up of 'Peach Apricots' and not 'Royal', all of which is fully known to the Seller, against the principles of this Association and a practice that we deplore and wish to in every way discourage." (Dried Fruit Association of California Arbitration No. 175, 1914).

Goods May Be of Better Grade Than Specified—Where a contract specifies a particular grade or where sale is subject to sample a well defined usage of trade in various commodities recognizes the principle that the delivery may be of a better grade than that specified or guaranteed by sample. It is well recognized and generally accepted that the purchaser of goods is in no way injured by receiving something better than the Seller had contracted to deliver. Stated conversely, while a Seller is obligated to deliver goods up to the grade specified or equal to the sample submitted, he is not limited to the identical grade described or sample submitted provided a better grade or superior quality is delivered.

Percentage of Fat in Manila Hydraulic Copra Cake—A contracted to sell B about twelve hundred (1200) tons hydraulic pressed **Copra Cake** in sound condition, protein guaranteed 17½ per cent, fat 4 to 6 per cent, October-November-December shipment from Manila, per sailer, f. o. b. cars San Francisco, in bags or matting, usual terms of contract. The sailing vessel "Moshulu" sailed from Manila November 12, 1919, and Seller tendered to Buyer bill of lading, showing shipment of about five hundred (500) short tons hydraulic pressed copra cake on October 21, 1919. The vessel arrived at San Francisco, March 2, 1920. B contended that the cake was damaged by water but this was not substantiated, and B's contention on this point was disallowed. As to the *maximum* percentage of fat content in Manila hydraulic pressed copra cake the arbitrators

Held, That it is neither customary nor practical to guarantee Manila hydraulic cake to have a *maximum* percentage of 4 per cent to 6 per cent fat. We therefore interpret the contract dated October 15 to mean that Seller guaranteed Buyer a minimum protein content of 17½ per cent, and a fat content of 4 per cent to 6 per cent, and as the various analyses made by the chemist show that both minimum guarantees were exceeded, we are of the opinion that B's claim in this connection must be disallowed.

It seems to be an established fact that undue excessive protein content would be injurious to feed materials, but in this instance, the protein content of the cake proffered by Seller to Buyer does not contain such an excess protein content as to render it injurious, or unsuitable, as a feed, and the same applies to the fat content of the cake tendered. The rules of the Interstate Cotton Seed Crushers Association do not permit of rejection, or any allowance, on cake, where the protein and fat content exceed the percentage specified in contract. It should also be noted that Rule 29 of our Association provides that *quality shall be equal to or better than sample submitted,* and the principle underlying this rule can, with reasonable justice to all parties, be applied to quality specified in the body of a contract. In other words, if goods tendered are equal to or better than quality specified in contract, claim for rejection or allowance should be disallowed. Buyer's rejection of the copra cake tendered ex sailing vessel "Moshulu" is disallowed. (Foreign Commerce Association Arbitration No. 5, 1918).

Description of Goods, Not Sample, Controls When Sale Is Not on Sample—Effect of Submitting Sample—A sold to B a quantity of **Beans,** the sale being consummated by the interchange of telegrams. The quality was stated to be "season's average" (under

the 1919 Uniform California Bean Contract), and Seller added in his confirming message "like sample expressed." Buyer objected to the sample, declaring that it did not grade according to "season's average." Therefore, there was an objection on the part of the Seller to deliver a car of "season's average" beans, he claiming the Buyer had a right to assume that the sample was representative of the "season's average"; in other words, the sample was to visualize the Seller's description of the goods tendered as such average. Buyer claimed that had Seller intended to sell a car of beans on sample he should not have stated that he was selling "season's average", as the Buyer had a right to assume that he was buying on that basis and no other. In his submission to the arbitrators, Seller did not claim that the sample submitted was "season's average" but set up that Buyer refused the sample and demanded a car grading up to the standard of "season's average" such as would pass inspection by the Chamber of Commerce of San Francisco, whereas he had sold goods as represented by the sample.

Held, That Buyer was justified in his contention that he purchased a car of "season's average" beans, and Seller was liable to Buyer for the difference in the market value of the beans on July 30th, the date upon which he notified Buyer he would cancel sale, namely $600, to be paid forthwith by Seller. (California Bean Dealers Association Arbitration No. 23, 1919).

Samples for Arbitration

Arbitrators May Determine Sufficiency of Samples—The general rule is that Arbitrators have the right to determine the sufficiency of samples drawn for arbitration, unless the parties specifically agree upon samples. In the absence of such agreements, the association to which arbitration is submitted arranges for representative sample of the disputed goods to be drawn by a disinterested sampler and sent to the association headquarters under seal to be opened in the presence of the Arbitrators. In sampling **Dried Fruit, Canned Goods, Beans, Rice, Peanuts, Copra Cake** and **Field-Grown Produce** generally it is customary to sample 5 per cent of the packages in such manner as to obtain an average thereof.

Sampling of Copra—In a dispute as to quality of **Copra,** sampling must be made by an independent sampler mutually agreed upon, who must draw samples from at least every tenth slingload as discharged from the vessel. (Foreign Commerce Association Rule No. 204).

Sampling (and Weighing) Vegetable Oil—Sampling (and weighing) of **Vegetable Oil** in case of dispute is provided for as follows:

"In case of rejection or dispute as to quality or weights or condition of packages, Seller shall be notified immediately, and shall be allowed 48 hours after receipt of same, proper time being allowed for transmission of communication, within which to arrange for sampling or weighing or inspection. Sampling or weighing shall be done by such person or persons as may be mutually agreed upon and as provided for in the Rules. (Foreign Commerce Association Rule 281).

"If the Seller refuses or neglects for 48 hours after notification to arrange for sampling or weighing or inspection as above, the Buyer may appoint an official inspector or weigher of this Association to draw samples or to weigh in the manner prescribed in these Rules. Such official inspector or weigher will be considered the representative of both Buyer and Seller.

"If sampling or weighing has to be done at a place where no official inspector or weigher of the Foreign Commission Association is available, then Buyer may appoint a representative of any other commercial body or recognized competent inspector, weigher or sampler, and when such samples or weights are submitted with proper affidavit as to all material facts establishing identity and the condition of the merchandise, such returns shall be considered authentic." (Foreign Commerce Association Rule 277).

Private Inspectors' Certificate Not Final With Arbitrators—When Question of Quality Is Submitted Arbitrators Will Decide—A sold to B 1,000 bags 38/40 **Chinese Shelled Peanuts,** F. A. Q. of the Season 1919, ex warehouse Seattle, and a dispute arose as to quality of 500 bags. In the absence of an agreement as to samples, the same were drawn by the representatives of the Foreign Commerce Association. The Arbitrators held that the goods were not a good delivery. Seller requested a reconsideration by the Arbitrators on the ground that, prior to arbitration, the parties had agreed upon an independent sampling and inspection by a certain public sampler, and that the certificate of such sampler, showing the goods to be F. A. Q., should have been final. Seller also demanded that another sample of the goods in dispute be drawn.

In supplemental findings, the arbitrators said:

"The arbitrators had presented to them all of the claims of the parties, and especially the official certificate prepared by the sampler viseéd by the Foreign Commerce Association and issued by the Seattle Chamber of Commerce and Commercial Club, and an individual grading determination by another Seattle sampler which was not viseéd and issued as was the first certificate mentioned herein. The arbitrators in examining new samples independently drawn, determined for themselves the quality of the goods and found that they were not F. A. Q. of the season 1919, and therefore the contention of the Seller with reference to the certificate was not sustained.

"Even had there been an understanding as to the finality of the last certificate, such understanding was entirely abrogated by the parties when they submitted the question of quality to arbitration. Also the contention of Seller that the percentage of splits does not enter into the question of quality was not sustained, as the arbitrators unanimously found that the percentage was in excess of a fair average.

"Inasmuch as Buyer and Seller agreed to submit the dispute to arbitration before the Arbitration Committee of the Foreign Commerce Association and having consented that said Association should draw the official samples for arbitration, in the opinion of the arbitrators it would not be consistent nor would the arbitrators be justified in calling for new samples, since thereby there would be no end to controversy as to the sufficiency of an official sample drawn for the purpose of determining quality. Therefore, the arbitrators decline further to review the matter and direct that their finding shall be considered as final." (Foreign Commerce Association Arbitration No. 20, 1920).

Buyer in Good Faith, Drawing Samples for Arbitration, Is Not Estopped from Maintaining Claim—A sold to B a quantity of Choice Recleaned Small White **Beans,** F. O. B. California shipping point. Upon arrival of goods at Eastern destination, Buyer took exception to the quality and demanded arbitration. At the time he objected to quality, Buyer drew samples said to represent the car. He paid the draft and thereupon distributed the car among four buyers. Seller took exception to Buyer drawing the sample for arbitration, which, under the terms of the Uniform California Bean Dealers Association contract under which the sale was made, should have been drawn by a disinterested party. Seller claimed that Buyer, by his failure to have samples drawn in the usual manner, forfeited his right to demand arbitration.

The matter coming properly before a committee of the California Bean Dealers Association it was

Held, That because Buyer took delivery of the car and distributed it in the most economical way, paying the draft and relying upon arbitration to settle the dispute, he should not be penalized for carrying out the terms and conditions of the contract, which provides that Buyer shall pay the draft and arbitrate any differences at a later date, provided that complaint is made on arrival or within the time specified by contract, i. e., if complaint is made within three business days after arrival of goods, Buyer has every right to take delivery of the goods and demand arbitration to determine the quality thereof. By so doing he facilitates business, frees equipment and shows a proper confidence in the principles of arbitration for prompt settlement of disputes.

Continuing, the arbitrators commented as follows:

"Preliminary to determining the question of quality of the beans, the arbitrators feel that if Seller has shipped a carload of beans to the Buyer and it is found at destination that the goods unquestionably are below grade, irrespective of the fact that the car may have been distributed and provided at all times that the quality of the shipment can be ascertained by samples taken by an efficient sampler (a disinterested party), the Buyer is entitled to consideration and the right to arbitrate the question of quality on samples which shall be satisfactorily established in the minds of the arbitrators as being fair samples of the shipment."

Having established by the affidavit of a disinterested person that samples were drawn from the identical shipment after distribution thereof, Buyer's claim for allowance on account of quality was awarded by the arbitrators. (California Bean Dealers Association Arbitration No. 15, 1921).

Shipment

Shipment Defined and Discussed—Shipment means the placing of goods on board a vessel destined for the port intended for delivery, or delivery to a rail carrier, and a bill of lading issued therefor. Stated in a general way, shipment may be said to be effected when the goods pass out of the custody and control of the Seller into the possession of a carrier for transportation.

Shipment does not mean the sailing, steaming or clearance of a vessel. Thus, where a cargo has been placed on board a vessel destined for the port of delivery within the shipping period specified in the contract, the subsequent delay of the vessel, awaiting other cargo or caused by any contingency unknown to the shipper or beyond his control, will not affect the time of shipment. The shipper does not control the movements of a vessel nor regulate its time of clearance, sailing or steaming. If the shipper is charterer of the vessel, however, he does control its movements.

Direct Shipment means the carriage in the same vessel of goods from one port to the port of destination, and does not contemplate the transshipment from one vessel into another. But if transshipment be necessary as the result of a *force majeure* happening, goods so handled would be considered as shipped direct, since the contingency would be beyond a shipper's control, provided, of course, that the contract of sale exempts such contingency.

It should be borne in mind that under the forms of bills of lading usually used by steamship carriers, the carrier company reserves the right of forwarding the whole or any part of the goods to their destination by any other steamer or steamers belonging to the original carrier company or any other company or person, proceeding either directly or indirectly to such port of destination, and all risk of transshipment, landing, storing or reshipment shall be borne by the shipper or owner of the goods. Also, it is usually provided in bills of lading that in case of quarantine the goods may be discharged into quarantine depot, hulk, lighter or other vessel as required for the carrying vessel's despatch; or should this be found impractical, the vessel may proceed on its voyage and land the goods at the nearest safe port in the master's opinion, at the risk and expense of the owner of the goods. Quarantine expenses upon the goods of whatever nature or kind and howsoever incurred shall be borne by the owners of the goods and paid before delivery, under the bills of lading used by many lines.

It will thus be seen that while the term *direct shipment* may be used in contracts, there are many contingencies that may arise, clearly beyond the control of a shipper, which are provided for under bills of lading. These contingencies may be of such a nature that *direct shipment,* technically construed, could not be accomplished, notwithstanding that a shipper may have made his contract of affreightment in good faith with the carrier and the goods have gone forward destined to the port named in the contract.

In connection with rail shipments, another feature that deserves brief consideration is transshipment from the cars of one carrier to other equipment, or from a narrow gauge carrier to the equipment of a standard-gauge line. Damage to a freight car may compel the transfer from such car to another, and at the same time the actual *shipment* of the goods not be affected. So, also, the transshipment from one line to another necessitated by the difference in gauge of the two rail carriers. Assuming, for example, that a shipment originated on a narrow-gauge line requiring reloading at another point into standard gauge equipment for transcontinental or other movement, the shipment via the originating carrier would be the controlling factor and not the reloading into the equipment of the connecting line.

Indirect Shipment means the transshipment of goods from one vessel to one or more vessels at a port or ports.

Time of Shipment an Essential Element of Contracts—An essential element of commercial contracts is the time of shipment of the goods or the time fixed in the contract for its fulfillment. In the absence of a specified time of shipment or delivery a reasonable time is implied, and what is a reasonable time depends upon the facts and surrounding circumstances of each contract.

It is customary for merchants in commerce to fix a time for shipment of goods, e. g. *Shipment October-November from Pacific Coast, Last Half November from Plant,* or *January-February from Orient.* Such terms fix within the custom of the particular trade involved the time for shipment of the goods. If the contract covers goods to be *shipped from the Orient,* in a named month or during a specified period, it is the duty of the Seller to see that the goods are in possession of a carrier for transportation before the expiration of the designated time.

There are likewise various terms employed in trade that signify the time of shipment, such as the following:

Quick Shipment—Within two working days.
Immediate Shipment—Within five working days.
Prompt Shipment—Within ten working days.

A requirement for shipment in the "first half" of a named month is fulfilled if shipment is made any day prior to midnight of the day marking the exact half of the calendar month, e. g. "first half" of February would be before midnight of February 14th, "first half" of April would be before midnight of April 15th, "first half of January" would be before 12 o'clock noon of January 16th. The latter example may be considered a purely technical one, for the reason that bills of lading do not show the hour of issue. It is customary for shippers to consider midnight of the fifteenth day of the month as the time for making shipment in the "first half" of a month; but it would be doubtful if the 15th of February would be considered the "first half" of that month.

The date of the bill of lading is evidence of the time of shipment. It may be stated as a general proposition that a bill of lading reading *Shipped on board the Steamer Y*, etc., admits of less doubt than a bill of lading reading *Received for shipment per the Steamer Y*, etc.

The form of the bill of lading is a vital factor, especially in the shipment of goods by ocean from one country to another. A recent court decision in England (Diamond Alkali Export Corporation v. F. Bourgeois, K. B. July 1, 1921) has sharply differentiated between *received for shipment* bills of lading and *shipped on board* bills of lading. Interpreting what kind of a bill of lading is called for under the English Bills of Lading Act (1855), the court said, in effect, that a *received for shipment* bill of lading was a mere *receipt for the goods*. The court expressed the view that the remedy lies in appropriate contract clauses validating the *received for shipment* bill of lading.

In many trades this has been done. The Uniform Contract of the Dried Fruit Association of California provides as follows:

> "On water shipments, bill of lading shall be ocean bill of lading; an Overland or Sunset Gulf shipments, bill of lading may be either through export bill of lading or ocean bill of lading from Atlantic or Gulf port accompanied by certified copy of domestic inland bill of lading, covering shipment from point of origin to Atlantic or Gulf port. An ocean bill of lading shall be sufficient if it acknowledge either receipt for shipment or receipt on board."

The issuance by a carrier of a bill of lading is *prima facie* evidence that the goods have come into its possession. The authenticity of the bill of lading may be brought into question by evidence of fraud, collusion or mistake in its issuance, but it is the general rule, in commercial matters, to give the date of a bill of lading the very highest consideration; for the lading is evidentiary of the goods themselves. In overseas commerce the bill of lading is a document as important usually as the draft.

Under the provision of the Harder Act, a carrier incurs a penalty of $5,000 for the issuance of a bill of lading before receiving the goods for shipment.

Since the time of shipment of goods is a vital provision of contracts it follows as of course that disputes concerning it often arise, and arbitrators have time and again decided general principles applicable to all trades.

Notwithstanding shipped to Seller's order, goods sold F. O. B. cars or F. O. B. vessel for transshipment from port of entry, are at risk of Buyer from and after delivery to carrier at port of transshipment and upon issuance by carrier of bill of lading or shipping receipt. (Foreign Commerce Association Rule 26).

Shipment—Direct and Indirect

Withdrawal of Regular Vessels From Route Does Not Justify Transshipment Under Direct Shipment Contract—Force Majeure Does Not Operate—A Pacific Coast importer sold to a San Francisco merchant a quantity of **Colombian Coffee**. There were two contracts, the first providing "Colombia Coffee, usual good quality Medellin Extra, at 18 cents per lb. February–March–April shipment from the source to San Francisco. Direct shipment to San Francisco." The second contract called for 1000 bags of Medellin Excelso at 18½ cents per lb., the other terms of the contract being identical with the first.

As to the contract for 1000 bags Medellin Extra Coffee, Buyer rejected, claiming that Seller had breached the contract in the following particulars:

1. That shipment was not made within contract time and coffee was not tendered until July 28th.
2. That coffee tendered for delivery was not Medellin Extra.
3. That direct shipment from source was not made as it was transshipped en route.

Seller claimed that the coffee was shipped within contract time from source, viz: Medellin, Colombia, and submitted documents showing it was delivered to the Antioquia Railroad at Medellin from March 26th to April 26th, inclusive. That he tendered to Buyer Medellin Excelso, a higher grade of the same coffee, at the contract price for Medellin Extra, and that a tender of a higher grade at the price of the lower should be a good delivery.

That after the contract was entered into the permanent direct line of steamers by which he expected to ship the coffee discontinued service and that he was obliged to ship over two lines and consequently claimed the operation of the *force majeure* clause of the contract.

Therefore, Seller denied the right of Buyer to reject the shipment in question.

Held, That the contract distinctly provides *Direct shipment to San Francisco.* The evidence clearly shows that such direct shipment was not made, as the coffee was transshipped en route, and we decide that *force majeure,* as claimed by Seller, does not apply in this case.

We find that Seller did not comply with the terms of the contract in regard to making direct shipment, and we decide that Buyer has the

right to reject the shipment tendered by Seller ex "San Juan" on that account.

As our decision on this point decides the right of Buyer to reject, which is the question at issue, we consider it unnecessary to go into the other two points upon which claim for rejection was also made. (San Francisco Chamber of Commerce Arbitration, 1921.)

Direct or Indirect Shipment Permitted When Contract Is Silent on Routing—Transshipment Under C. I. F. Contract— A San Francisco importer sold another importer in the same city a quantity of No. 1 Siam Usual **Rice,** in bond, C. I. F. Havana, Cuba, December-January shipment from Hongkong to Havana. Shipment from the Orient was made in contract period, and the goods were transshipped at San Francisco for Havana. Buyer refused to accept the documents on presentation on the ground that shipment was not made direct to Havana, and, further, demanded interest on the amount of invoice on account of the delay in arrival of the goods at destination and also sought a guarantee from the Seller that he would reimburse Buyer for any loss that might accrue by reason of claims made by the ultimate purchaser in Cuba. Seller refused the claim, and maintained that, under the terms of the C. I. F. contract, he was entitled to ship either direct or indirect by vessel and/or vessels to Havana.

Held, That the contract does not specify direct shipment, and therefore the Seller had the option of transshipping the Rice. Buyer is not entitled to interest by reason of any delay which might be incurred in shipping the rice via San Francisco, but must accept the Rice at full contract price. (Rice Association of California Arbitration No. 28, 1920).

Shipment, Time of

Date of Bill of Lading or Shipping Receipt Final as to Date of Shipment—The general rule as to date of shipment is that the date of bill of lading or shipping receipt is final as to date of shipment, in the absence of fraud, collusion or mistake.

Rule No. 9 of the Foreign Commerce Association reads: "The date of ocean bill of lading showing goods on board shall be evidence of time of shipment."

When sale provides for a given time of shipment from abroad, unless based upon "payment in exchange for ocean documents" Seller has the option of filling contract with goods shipped earlier than contract period, provided time of delivery is approximately the same. (Foreign Commerce Association Rule 10.)

Should Seller fail to ship within contract period, unless for reasons beyond his control, Buyer may, after 48 hours (Saturday afternoons, Sundays and holidays excepted) from receipt by Seller of telegraphic advice, either purchase for Seller's account through a reputable broker, or cancel that portion of the contract on which Seller has defaulted, any expense in connection therewith to be for Seller's account. (Foreign Commerce Association Rule 12).

Applies to Domestic Shipment—The Uniform Vegetable Oil Rules of Foreign Commerce Association of Pacific Coast, the New York Produce Exchange and the Interstate Cottonseed Crushers Association make the date of bill of lading applicable to domestic shipment. Foreign Commerce Association Rule No. 257 reads: "The date of bill of lading shall be considered as the date of shipment, this to apply to the shipment of the merchandise as well as to the forwarding of empty tank cars."

Under a contract calling for August shipment from Manila, it was held that shipment of a portion of a cargo of Phillippine Whole **Coconuts** on Oct. 1st was justified, the first carrier having shut out a portion of the cargo following a typhoon during loading, the Seller not being responsible for delayed shipment under the "Casualty clause" of the Uniform Contract of the Foreign Commerce Association of the Pacific Coast (Rule 2). The original or first bill of lading specified the entire quantity of nuts tendered to the carrier, but bore the notation *subject to production and condition of mate's receipt.* This receipt specified only the number and tonnage of nuts actually loaded on the first carrier

and bore the notation *All in bad order and condition.* (Foreign Commerce Association Arbitration No. 33 and 33A 1921, Page 205).

Rejection of Chinese **Shelled Peanuts** purchased under a C. I. F. Seattle contract, January-February shipment from Hongkong, because bill of lading was dated January 31st, whereas vessel on which shipment was made did not actually sail from Hongkong until Febuary 13th was not sustained in the absence of a showing of fraud on the part of Seller or his supplier or collusion with the steamship company in connection with the date of bill of lading. (Foreign Commerce Association Arbitration No. 14, 1920, Page 193).

A Buyer who gives notice of rejection of a shipment of **Dried Fruit** because Seller failed to supply private labels on the entire shipment, and failure having been occasioned by Buyer's neglect to furnish boxing specifications in time to permit affixing such labels, is estopped from setting up a violation in the time of shipment clause in the contract in support of his rejection, he having refused to accept a valid tender in time to obtain bill of lading dated within contract period. (Dried Fruit Association of California Arbitration No. 14, 1920, Page 187).

Seller's contention that he was prevented fulfilling an August-September shipment of **Apricot Kernels** within shipping period by reason of a shortage in rail equipment was not sustained, and Seller was penalized for delaying shipment until November, there being nothing in the contract protecting him for such contingency as car shortage. (Dried Fruit Association Arbitration No. 7, 1920, Page 191).

Rejection by Buyer of a full cargo of **Copra** sold for October-November-December shipment was sustained upon proof that loading of the vessel was not begun until January 5th, notwithstanding that the bill of lading was dated December 31st and regardless of Seller's contention that the vessel was alongside and the cargo ready to load and that he was prevented from effecting shipment because of contengencies beyond his control. (San Francisco Chamber of Commerce Arbitration, 1921; also San Francisco Chamber of Commerce Arbitration Appeal, 1921, Page 195).

Under a contract calling for shipment of **Dried Fruit** "first half of October" rejection by Buyer was not sustained when it was shown that vessel was scheduled to sail October 14th, that bill of lading was dated October 14th, but vessel was delayed due to congestion of cars and inability to complete loading of vessel. (Dried Fruit Association of California Arbitration No. 228, 1914, Page 189).

Under an F. O. B. California point contract calling for *prompt* shipment of **Beans,** rejection on the ground of delay in shipment, instructions having been given October 11th and shipment not being made until October 24th, was not sustained, it being shown that (1) the instructions were not received by shipper until 5:51 p. m. on the 11th; (2) the 12th was a holiday and (3) the 13th fell on Sunday, so that the ten-day period permitted for *prompt* shipment did not begin until the 14th and therefore shipment made on the 24th was within the meaning of the term *prompt.* (California Bean Dealers Association Arbitration No. 16, 1918, Page 198).

A principal will not be excused from delay in shipment under a contract calling for *immediate* shipment because his broker failed to advise that his sales memorandum specified *immediate* shipment, and he cannot make a second tender after the *immediate* shipping period has elapsed. (California Bean Dealers Association Arbitration No. 19, 1918, Page 33).

Rejection of a quantity of Manila **Coconuts,** under contract for shipment in the month of August, on the ground that shipment was not made as to a portion of the coconuts until October 1st, was not sustained on appeal from a contrary award upon a showing that the entire cargo had been tendered a carrier, a bill of lading issued and during the loading a typhoon occurred, the vessel thereafter shutting out a portion of the cargo. The remaining cargo was shipped on the next available steamer. Arbitrators held that the provisions of the "Casualty Clause" absolved Seller of responsibility for the delay in time of shipment. (Foreign Commerce Association Arbitration No. 33A, 1921, Page 205).

Under a contract calling for March shipment from the Orient of **Rice,** shipment on April 9th was held to be within the life of the contract under a printed clause providing *Variation of ten days in time of shipment or arrival not to constitute grounds for rejection.* (San Francisco Chamber of Commerce Arbitration on Appeal from Rice Association, 1920, Page 217).

New evidence as to time of shipment will be received by the Committee on Appeals of the San Francisco Chamber of Commerce, notwithstanding that the rules of arbitration of the Rice Association of California (a subordinate association affiliated with the Chamber of Commerce) fix a limit of five days for the production of new evidence, the Committee on Appeals taking the position that the purpose of commercial arbitration is to do substantial justice between the parties.

(San Francisco Chamber of Commerce Arbitration on Appeal, 1920, Page 217).

Failure to ship **Rice** in contract time because of heavy rains, followed by flood conditions which interfered with river navigation, is excused under "Extension of Time" Clause of Uniform Contract of Rice Association of California. (Rice Association of California Arbitration No. 4. 1921, Affirmed on Appeal, Page 88).

Delay in shipment of Chinese Shelled **Peanuts** consented to by Buyer cannot subsequently be set up by him as valid cause for rejection on account of late shipment. (San Francisco Chamber of Commerce Arbitration, 1920, Page 215).

Rejection of **Rice** sold for February-March-April shipment on the ground that the vessel did not arrive at Hong Kong, the port of origin, until May 4th and did not leave until May 7th, was not sustained, Seller having shown that he had engaged his freight space January 9th, that the vessel was scheduled to leave in April and that the rice was delivered to the carrier and a bill of lading issued April 20th, arbitrators stating that the date of bill of lading is accepted by the trade as date of shipment, unless fraud is shown. (San Francisco Chamber of Commerce Arbitration, 1920, Page 74).

Actual delivery of goods to a vessel and the loading thereof on board constitutes shipment by a Seller, and when it can be shown that this was done in any particular case within the required time, the date of the bill of lading need not be considered as the date of shipment. (San Francisco Chamber of Commerce Arbitration on Appeal, 1920, Page 217).

Penalty for Late Shipment—Verbal Agreement Governs— A sold to B a quantity of **Dried Fruit** for September shipment, and at the time of sale was advised by B that the goods were for a purchase in Stockholm. It was mutually agreed that A would protect B against any loss occasioned by the failure of A to make delivery within contract period. A did deliver approximately one-half of the contract quantity on September 30th and the remainder October 5th. Subsequently the Stockholm purchaser objected to the delivery outside the contract time and demanded an allowance of the prevailing basis price, a difference of about $350. Further negotiations resulted in his final offer to settle for 1,000 Kronen, or about $266, a claim which A rejected.

Upon the submission to arbitration, A acknowledged that there had been a verbal agreement with B that if the Stockholm merchant should make a reasonable claim because part of the goods went forward under an October bill of lading, when the contract called for September shipment, A would "stand behind B." A made a further point that "no definite agreement as to the amount of this allowance was made either verbally or in writing." B, on the other hand, produced a letter to A under date of October 9th stating his position with relation to the probable claim on account of late shipment, a communication not excepted to by A in his acknowledgment thereof.

Held, That all other questions, such as Seller's inability to obtain steamer space, are waived by the verbal agreement admitted by the parties, and the fact that a definite amount was not named at the time in no way alters A's responsibility to protect B, because, at the time the verbal agreement was entered into, the claim, if any, as to amount was problematical. The claim of the Stockholm merchant is not "unreasonable" and B is entitled to reimbursement therefor. (Dried Fruit Association of California Arbitration No. 126, 1912).

Seller Not Responsible for Buyer's Laches—A sold B a quantity of **Dried Fruit,** October shipment from Pacific Coast. Under the terms of the contract B was allowed to change boxing specifications, provided A received such changed specifications by September 1st. B did not furnish his specifications until October 4th, 19th and 22nd, and A diligently undertook to comply therewith and use the labels specified. A contended that as a result of this effort on his part, made at B's request, he was unable to effect October shipment with all of the boxes labelled according to specifications and that he was justified in making delivery either in blank boxes or under his own brand as the necessity might determine.

In discussing this case, the arbitrators said:

"The arbitators have applied the following well established rule of law, viz:

> " 'Where a party stipulates that another shall do a certain thing, he thereby impliedly promises that he will himself do nothing which will hinder or obstruct that other in doing that

thing, and indeed if the situation is such that the co-operation of one party is an essential pre-requisite to performance by the other, there is not only a condition implied in fact qualifying the promise of the latter, but also an implied promise by the former to give the necessary co-operation.'

"There was an implied obligation on the part of the Buyer to see that labels were supplied in ample time and the failure of Buyer to live up to this obligation justified the Seller in making delivery in either blank boxes or under his own brand."

Held, That while A acted under and endeavored to comply with B's specifications and undertook to use B's labels which were not obtainable until the closing days of October, it was an act of grace on A's part, he is, therefore, absolved by the rule above quoted from the consequences of failure to use B's labels on a portion of the boxes. The contention of B that he is entitled to reject the shipment because of inability to obtain October bill of lading is untenable in view of the fact that as this was a proper delivery under the contract he should have accepted the car, in which case he would have received October bill of lading, since car was loaded, and contract would have been completed. (Dried Fruit Association of California Arbitration No. 14, 1920).

Postponement of Vessel's Sailing—Seller Not Responsible for Late Shipment—A sold to B a quantity of **Dried Fruit** under the 1912 Uniform California Dried Fruit Contract, water shipment, shipment via California Atlantic S. S. Company line during August-September, 1912. The original contract was modified by mutual consent, permitting Seller to ship by steamer of named line scheduled to sail about October 9th. The fruit was shipped from Fresno September 30th, arriving at the San Francisco dock October 3rd. On the 4th it was duly inspected and certificated as to grade. The goods, however, did not go forward on October 9th, owing to the fact that the S. S. "Luckenbach" scheduled to sail on that date, was withdrawn, her sailing being postponed until the 25th and thereafter again altered to October 20th. No steamer sailed on the 9th. September 27th Seller learned that October 9th vessel had been postponed until the 25th, and immediately wired Buyer this information, also adding "absolutely impossible secure space Pacific Mail. Shall we hold 25th or ship American-Hawaiian October 13th," to which Buyer replied on the same date: "*Cannot*

accept purchase. Consider contract cancelled." September 30th Seller replied to this telegram, pointing out that as the October 9th sailing had been postponed Buyer was not released under the express provision of the contract covering such contingency. Buyer not replying thereto, Seller wired October 2nd, urging reply, which, not being received, he again wired October 3rd informing Buyer that he had been able to secure space on S. S. "Mackinaw" scheduled for October 12th. The same date Buyer advised: *"We consider contract cancelled unless goods shipped according to modification of contract."*

In support of his contention, Buyer claimed that, having voluntarily made one modification as to time of shipment the "Responsibility" clause in the contract was not applicable; that shipper did not act in good faith in that he did not give correct information as to sailing dates of steamer and offered as evidence of the fact a letter from the steamship company's New York office.

Held, That after corroborating all dates of steamers and changes in sailing dates from the steamship company, the Seller, instead of being guilty of laches, has at all times done all in his power to expedite the shipment. The information of sailing dates as given Buyer was absolutely correct as evidenced by the steamship company. The goods were shipped by the "first available steamer" and in exact accordance with the terms of the contract. Buyer's own statement of the case makes it clear that his position is unjustified and upon the whole evidence we cannot but feel that his claim was frivolous, untenable and never should have been the subject of arbitration. (Dried Fruit Association of California Arbitration No. 109, 1912).

Shipment "First Half October" Does Not Mean Sailing or Steaming—Effect of Car Congestion—Date of Bill of Lading— A sold to B, under the Uniform Dried Fruit Contract for water shipment, dated May 14, 1914, a quantity of **Dried Fruit.** The contract called for delivery to be made to steamer from San Francisco, steamship company's dock, Pacific Coast Port(s) first half October, 1914. Buyer contended that Seller had not complied with the contract in that the Atlantic and Pacific Steamship Company's steamer "Santa Clara" was not scheduled to sail until October 16th, and that the bill of lading was dated October 14th. The record showed that the goods were delivered to the carrier on October 14th, inspected by the Dried Fruit Association of California, and certificate issued on the 15th. The bill of lading was dated October 14th. Buyer contended that Seller had not met his contractual obligation by shipping per a steamer leaving

after the expiration of the *first half of October*. Seller claimed the application of the following clause in the water shipment contract:

"On sales made by water from Pacific Coast points..................the bill of lading shall be deemed conclusive evidence of shipment on the date it bears."

There was submitted to the Arbitrators a letter from the steamship company stating that the S. S. "Santa Clara" was originally scheduled to sail October 14th, and, further, that the delay was due to congestion of cars and the carrier's inability to complete loading of other cargo in time to sail on October 14th.

Held, That Seller fully complied with all contract requirements and there was no merit in the contention of the Buyer. (Dried Fruit Association of California Arbitration No. 228, 1914).

"First Available Steamer" Shipment Defined—Seller's Fault if Vessel Is Missed—A sold B a quantity of **Prunes** under two contracts dated January 27th, and specifying *"shipment first available steamer."* Buyer contended that goods were not shipped on the first available steamer and therefore the contract was breached by Seller. The record showed that immediately sale was made Seller made a contract of affreightment with the American-Hawaiian Steamship Company on a vessel scheduled to sail February 19th. The goods were shipped from San Jose on February 18th and the records of the rail carrier showed that they arrived at San Francisco on the evening of the 19th, and were delivered to the "Belt Line" 3:10 p. m. on the 20th, too late for the steamer on which space had been engaged, which was clearly the *first available steamer.*

Held, That the contract is clear as to time of shipment, and from the record it is evident Seller did not comply therewith. It likewise provides that the bill of lading shall be conclusive evidence of shipment on the date it bears. The bills of lading in this case are dated February 26th and the goods went forward by steamer on the 29th, which was not the *first available steamer.* Buyer cannot, therefore, be called upon to accept these goods and no allowance granted would be fair to him, when he demands rejection. It was the shipper's duty to ship in accordance with the contract unless he could obtain the written consent of Buyer to an extension of time.

As shipment did not constitute a delivery, Buyer is released from both contracts. (Dried Fruit Association of California Arbitration No. 257, 1915).

Inability to Obtain Cars No Excuse for Late Shipment—Seller Penalized—A sold B, a Rotterdam, Holland, merchant, a quantity of **Apricot Kernels** for August-September shipment. Shipment was not effected until November 6th, Seller claiming that inability to obtain cars caused the delay. B demanded an allowance on account of late shipment.

Held, That there being nothing in the contract providing for relief of Seller for inability to obtain cars, his contention that the delay was caused by such lack of cars cannot be considered, and Buyer is entitled to reimbursement in the sum of $2.00 per 100 pounds, which in the circumstances, is a reasonable and just claim, and therefore is allowed. (Dried Fruit Association of California Arbitration No. 7, 1920).

"August-September Shipment" Not Fulfilled by October 1st Shipment—Day's Time an Important Variation in Contract—Rejection Permitted—A sold B a quantity of **Dried Fruit,** August-September (1919) shipment from Pacific Coast. B rejected the goods tendered on the ground that shipment was not in conformity with the contract, i. e., that it was not made until October 1st. A contended that the shipment, having been made October 1st, only one day late, he was protected under the general clause in the Uniform Dried Fruit Contract reading as follows:

"No unimportant variation in the performance of this contract shall constitute basis for a claim."

A further contended that, while the goods were packed and ready for shipment within contract period, there was a shortage of cars which prevented shipment. B pointed out that the goods had been purchased by him for export and time of shipment was a vital provision in the contract.

Held, That the clause in the contract cited by A is not applicable, since a delivery on the 1st of October under a contract which provides for August-September shipment, cannot be considered as an *unimportant variation.* The contention that goods were ready for shipment but were unshipped because of car shortage is of itself not sufficient, since the contract provides that in such case, Seller must notify Buyer before the expiration of shipping date. Rejection, therefore, is sustained. (Dried Fruit Association of California Arbitration No. 2, 1919).

Date of Clearance Not Date of Shipment—Seller Cannot Guarantee Actual Sailing—A sold to B a quantity of Japanese **Kotenashi Beans** for "December-January-February shipment from the Orient." B rejected the tender on the grounds, first, that goods

were not shipped within contract period, and second, that tender was not made within a reasonable time after arrival of vessel.

Seller submitted a copy of the bill of lading of the "Nippon Yusen Kabushiki Kaisha," dated at Otaru February 23, 1919, covering goods shipped ex S. S. "Toyoha-hi Maru" to be transhipped into the S. S. "Kaifuku Maru" or subsequent steamers at Yokohama, Seattle being the port of destination. Buyer contended that the S. S. "Kaifuku Maru" was not cleared by the customs at Yokohama until March 3, 1919, whereas the contract specifically required shipment "not later than December-January-February shipment from the Orient." Buyer's contention, therefore, was that the date of the vessel's clearance from Yokohama was the date upon which the goods were shipped "from the Orient." As to this point it was

Held, That trade custom does not support this contention, but on the contrary invariably accepts the date of the bill of lading as the date of shipment. In this connection the steamship company specifically reserves for its steamers "liberty to call, touch and stay at any intermediate port or ports whether in or out of the customary route of the voyage." Manifestly it would be unfair to insist that the shipper guarantee actual sailing, steaming or clearance of any vessel over which he had no control at or upon any particular date. A shipper performs his obligation when he tenders goods to the carrier and obtains a bill of lading therefor within the time limit fixed by the contract. This, in in the opinion of the arbitrators, is a logical and just conclusion, for were it otherwise, a vessel might proceed to another Oriental port after it had actually cleared for a Pacific Coast port, a circumstance entirely beyond control of shipper, notwithstanding that he had exercised every diligence in making shipment. Therefore, the arbitrators accept the date of lading as the date of shipment.

The second cause of rejection raised by Buyer was unreasonable delay in delivery. The S. S. "Kaifuku Maru" arrived at Seattle March 26, 1919, and tender of goods was made April 15, 1919, seventeen business days having elapsed between the date of arrival and the date of tender of delivery order for the goods.

Held, That tender was not made within a reasonable time and that Seller did not exercise due diligence in making tender. Indeed, Seller does not claim that any unusual circumstances interfered with making the tender. On the contrary Seller insisted that the contract did not require that he tender documents within any specified time. Nevertheless, the arbitrators are of the opinion that the failure to make prompt tender, in the absence of unavoidable reasons therefor, in this instance

seventeen (17) business days being permitted to elapse between arrival and tender, was an unreasonable delay and constituted a degree of negligence on the part of Seller that fully justified Buyer's rejection. (California Bean Dealers Association Arbitration No. 15, 1919).

Bill of Lading Evidence of Shipment—A sold B a quantity of Chinese **Shelled Peanuts,** ex dock San Francisco or Seattle, January-February shipment from the Orient, and delivery was tendered ex the S. S. "Eastern Planet", which arrived at Seattle on or about March 12, 1920. On examination by Buyer, nuts were found deficient in grade. Seller then stated that he had another lot arriving on the S. S. "Eastern Maid", February shipment from Japan, which was accepted in lieu of the first tender by Buyer, providing Seller furnished bill of lading showing that shipment was made within contract time. This Seller did and the original bill of lading was submitted by him as part of the evidence in this arbitration. Buyer claimed to have learned from the steamship agents that the "Eastern Maid" did not in fact sail from Kobe until March 15th, and that therefore he was not obligated to accept shipment unless it was conclusively proven that the vessel was actually scheduled to sail in February, maintaining that if scheduled to sail in March fraud was committed in the issuance of a February bill of lading. Seller offered in evidence a letter from his supplier quoting a cable from his office in Japan, reading as follows:

" 'Eastern Maid' scheduled sailing this port twenty-seventh February but delayed engine trouble."

Held, That Buyer has no just ground for rejection. In the absence of fraud, the date of the bill of lading is conclusive evidence of the date of shipment, because it designates the date when the goods passed out of the custody and control of the Seller. If thereafter, for any cause, sailing is delayed or the goods fail to go forward, the Seller cannot be held responsible. In this case there is no evidence of fraud and no confirming evidence supporting Buyer's information from the agents. On the contrary, Seller not only offers his bill of lading in good faith, but supplies cable definitely showing the sailing date and explaining the delay in actual sailing. (Foreign Commerce Association Arbitration No. 9, 1920.)

Bill of Lading Date Governs in Absence of Fraud—A sold B a quantity of Chinese **Shelled Peanuts,** C. I. F. Seattle, inspection and acceptance upon arrival. Buyer contended that shipment was not made within contract period, and he raised a further point as to the quality of the goods delivered. Shipment was made from Hongkong per S. S. "Inconium". The bill of lading was dated January 31, 1920, at

Hongkong, but the steamer did not arrive at Hongkong until February 9th and sailed from there about February 13th. Buyer did not submit proof of any fraud on the part of Seller or his supplier in connection with the date of bill of lading, nor did he allege any such fraud or collusion with the steamship company. The arbitrators said:

"The delay between the dating of the bill of lading and the actual arriving of the steamer at Hongkong is something which might well have been beyond the Seller's control, and in the absence of any proof to the contrary, the custom of the trade, that date of bill of lading be proof of time of shipment, must prevail. Therefore, Buyer's contention as to late shipment was not sustained."

As to the quality of the goods, Buyer admitted having taken delivery of the nuts and removed them from the dock where they were to have been inspected, and he further admitted that the failure to inspect at the proper time and place was due to the negligence of Buyer's agent. The contract specifically provided for an inspection and acceptance upon arrival, and Buyer's action in taking delivery without protest was in itself an acceptance of the quality. The Seller cannot be held responsible for the negligence of the Buyer or his agent, nor can he be held responsible for the condition of the peanuts after they have left the point of delivery to Buyer. Buyer, having accepted delivery, waived his right to question the quality thereof. The Buyer having so accepted the goods and having waived his right of rejection, cannot later raise the question of quality before Arbitrators.

Held, That shipment was effected from the Orient within contract period, as evidenced by the bill of lading, and Seller was justified in rejecting any and all claims by Buyer under this contract and delivery. (Foreign Commerce Association Arbitration No. 14, 1920.)

June Shipment Does Not Mean June Tender—Fixing Loss on Resale—Under a contract calling for eleven tank cars **Soya Bean Oil,** June shipment from the Pacific Coast, Buyer rejected as to two tanks, claiming that they were not tendered up to the end of June, although definite instructions had been placed by his agent and representative with Seller to ship one car to "X" at Cleveland, Ohio, and one car to "Y" at Relee, Virginia.

Held, First—That Buyer purchased for June *shipment,* not June *tender,* and that Seller fulfilled the terms of the contract for June *shipment* by subsequently *tendering* June shipment.

Second—That in view of the complicated and many times changed shipping instructions sent by Buyer's representative, Seller at all times

acted in absolute good faith and in accordance with the contract provisions.

Third—That Buyer is not entitled to reject the car in question and that the difference between contract and resale price shall be for the account of Buyer, together with costs of telegrams and brokerage.

Fourth—That there being sufficient doubt in the minds of Arbitrators as to whether the difference in freight on tank shipped to "X" at Cleveland, Ohio, was not due to Seller's failure to follow shipping instructions, the freight thereon shall be charged to Seller, and no allowance shall be made for any interest on deferred payments. (Foreign Commerce Association Arbitration No. 23, 1920.)

Wrongful Dating of Bill of Lading—Rejection Permissible—Adverse Winds Not Contingency Beyond Seller's Control, Being Usual to Sailing Vessels—A sold to B the full cargo of **Copra,** F. O. B. cars port of entry, ex S. V. "Narwhal" for shipment October-November-December from Savu Savu. The conditions of the contract were identical with those of the Uniform Copra Contract of the Foreign Commerce Association of the Pacific Coast. Upon arrival of the vessel at San Francisco, Buyer rejected, claiming that shipment was not effected within contract period, in that, although the bill of lading was dated December 31, 1920, loading of the cargo did not begin until January 5, 1921, and was not completed until January 15th. Buyer contended that inasmuch as the bill of lading specified that 589 tons and 12 cwt. were "loaded in and on board" the vessel on December 31st while actual loading did not commence, as revealed by the vessel's log, until January 5th, manifestly the bill of lading was in error. Seller contended that the vessel had arrived at Savu Savu on the evening of December 28th and had gone aground; that she was hauled off the following day and docked alongside where the cargo was stored; that the cargo was tendered to the vessel on December 31st. Seller maintained that Rule 9 of the Foreign Commerce Association of the Pacific Coast applied, which Rule read as follows:

"The date of bill of lading or shipping receipt shall be final as to date of shipment."

Seller further set up the operation of Rule 201, reading as follows:

"Seller shall not be responsible to Buyer for delayed or non-shipment directly or indirectly resulting from a contingency beyond his control, such as embargo, act of government, strike, fire, flood, drought, hurricane, war, insurrection, riot, explosion, epidemic, pestilence, earthquake, accident, perils of the sea, tidal wave, or any other contingency beyond Seller's control not herein enumerated. If, due to any of the causes provided

herein, shipment by steamer is not made within two months or by sailing vessel within three months after the contractual time for shipment, contract shall terminate with respect to any goods not then shipped."

Seller claimed that the vessel was prevented by "contingencies beyond Seller's control" from leaving Melbourne Harbor, where she had been wind-bound from November 15th to 26th, the pilot and tug refusing to take her outside on account of adverse weather conditions. Seller set forth that this was a contingency beyond his control and such being the case he was entitled to compensating time in which to make shipment, relying especially upon this provision of Rule 201, namely: *"If due to any of the causes provided herein, shipment by steamer is not made within two months or by sailing vessel within three months after the contractual time for shipment, contract shall terminate with respect to any goods not then shipped."*

Upon the question of the dating of the bill of lading the captain of the vessel gave testimony before the arbitrators, stating that the cargo had been tendered to him verbally on December 31st; that his vessel was alongside and the cargo ready for shipment, that it was necessary to discharge ballast before loading, but he also declared that he did not consider the vessel responsible for the cargo until after he had receipted for same, which he did after each day's loading. Upon the question of the vessel being wind-bound, the log was produced, showing that she was held up at Kunie Klift for ten days on account of storm conditions which prevented her departure.

Held, From the evidence submitted it appears that in a contract dated October 12, 1920, Seller sold to X a full cargo S. V. "Narwhal" in bulk, estimated about six hundred tons of "Fiji Sun-dried Copra, shipment to be per S. V. "Narwhal" from Savu Savu during October-November-December, 1920. Price seven and one-half cents (7½c) per pound, net landed weights F. O. B. cars San Francisco. The contract was made under the Uniform Contract adopted February 14, 1920, by Foreign Commerce Association of the Pacific Coast, First Edition, relating to sales such as the one in question. Subsequently B assumed this contract and appears in this case as Buyer.

The "Narwhal" arrived at San Francisco April 14, 1921, and Buyer rejected the cargo, claiming that the shipment was not made in contract period, as an examination of the vessel's log by a Marine Surveyor showed the vessel arrived at Savu Savu December 29th and did not complete discharging ballast until January 3, 1921, and began loading copra on January 5th and completed loading on January 15th, sailing January 18, 1921.

The bill of lading submitted is dated December 31, 1920, and specifies that 589 tons 12 cwt. were shipped in good order and condition in and upon the vessel named. Buyer claims that the shipment was a January, 1921, shipment and not a December, 1920, shipment and that date of bill of lading should be corrected to bear date of January 15, 1921, and that right of Buyer to reject the shipment be sustained.

Seller claims that, under Rule 9 of the Foreign Commerce Association, to whose aforesaid Rules the contract is subject, the date of the bill of lading shall be final as to date of shipment and that Bill of Lading in this case being dated December 31, 1920, the shipment had been made as per contract.

Seller, therefore, claims that Buyer should take delivery of the said cargo and pay for same and also pay demurrage of vessel and any other charges accrued and interest on the deferred payment.

We have examined the copy of the vessel's log, and the original log was also produced, and we find that loading of the cargo appears therein as having begun on January 5, 1921. That the vessel arrived at the Savu Savu dock on December 29th and was engaged, while working, in discharging ballast until and including January 3rd. That loading cargo was completed January 15th.

We requested the captain of the vessel to appear and testify regarding the signing of the bill of lading and when the exact quantity of copra specified therein was inserted in bill of lading as it did not appear that the exact quantity the vessel could load could be known by him on December 31st.

From the captain's testimony it is in evidence that he did not sign the bill of lading until January 15, 1921, when loading was completed and that the quantity loaded was inserted at that time when he signed it. Furthermore that he did not notice when he signed the bill of lading that it bore date of December 31, 1920, and that he did not begin loading copra until either January 4th or 5th.

As regards Rule 9, referred to by Seller, we feel that the date of bill of lading should be evidence of shipment unless proof to the contrary is furnished and such proof has been furnished in this case.

The date of the bill of lading is supposed to be the date it is signed and executed in order to make it a complete document.

In this case it is clearly shown from the captain's testimony that the bill of lading was not signed until January 15, 1921, which was the earliest date when the amount of copra shipped could be known and inserted in the bill of lading as the shipment was to be a full

cargo and the Seller in this case was also the Charterer of the vessel and this bill of lading calls for a specific amount of cargo being shipped and does not contain the words "more or less."

Therefore, the bill of lading was erroneously dated December 31, 1920, and the correct date that should appear on it would be January 15, 1921, the date it was signed, and in view of the evidence in this case we find that the cargo was not shipped in accordance with terms of contract which called for October-November-December shipment.

As regards Rule 2, "Casualty" of the Rules of Foreign Commerce Association, referred to in Seller's statement of facts, relating to delay in shipment due to casualty, we do not consider in case of a sailing vessel, that adverse winds, to the extent shown to have occurred in this instance, which are a well known common occurrence and therefore to be expected on any such voyage, can be considered as a "Casualty" coming within the meaning of said Rule 2 that relieves Seller from liability for late shipment on that account.

We decide that the shipment in question was not made within the time limits of the contract and that Buyer is not required to take delivery of the cargo and shall not be held liable for any demurrage of vessel or other charges that may have accrued to vessel. (San Francisco Chamber of Commerce Arbitration, 1921).

Affirmed on Appeal—Seller appealed, claiming error on the part of the arbitrators, particularly that Rule 2 had been applied instead of Rule 201, which governs Copra, and also that the arbitrators had not given due consideration to the fact that the vessel had been windbound at Melbourne, a contingency provided for in the rules governing the transaction.

Held, That the findings and award of the Arbitration Committee are sustained in their entirety and no error was committed. (San Francisco Chamber of Commerce Arbitration Appeal, 1921).

Note—Obviously there was error on the part of arbitrators in applying Rule 2 to a Copra contract. The rule referred to should be Rule 201. However, the reasoning of the award indicates that the arbitrators would have made the same decision had the proper rule been cited. The Appeals Committee remained silent on this point.—*Ed.*

Legal Holidays Affecting Time of Shipment—Meaning of Term Prompt—A sold B a quantity of **Beans** for *prompt* shipment F. O. B. common California shipping point. Buyer gave shipping instructions by wire on October 11th, which were not received by Seller,

according to the records of the telegraph company, until 5:51 p.m. of that day. October 12th was a legal holiday and October 13th was Sunday. Shipment was made October 24th.

Held, That the 10-day period for *prompt* shipment did not begin to run until October 14th, and shipment having been made October 24th, *prompt* shipment had been complied with. (California Bean Dealers Association Arbitration No. 16, 1918).

Strike Does Not Excuse Seller Unless Mill Is Specified or Strike General—Extension of Time Under Misapprehension or Misrepresentation—Differentiation Between Strike and Labor Trouble—Buyer Must Notify Seller Before Purchasing for His Account, Else Damages for Late Shipment Will Not Lie—A Calcutta merchant sold to a San Francisco importer a quantity of bales of Calcutta **Grain Bags** for shipment in March, April and May, 1912. Failing to effect shipment, Seller claimed exemption from responsibility (1) because there were strikes in Calcutta mills, (2) Buyer was bound to notify Seller before purchasing bags for his account, and (3) that drafts were accepted and paid by Buyer who took delivery of the bags for his own account and did not make claim for late shipment until October 1, 1912. Buyer claimed (1) that upon notification on April 19, 1912, that there would be a delay by reason of strikes in shipment of 1,000 bales contracted for April shipment he consented to an extension of time for April shipment solely on the representation that strikes had interfered; (2) that he did not discover until September that the representation made by Seller was incorrect, inasmuch as there was no general strike in Calcutta.

The evidence showed that there were approximately 41 mills which could make grain bags; that the Seller had purchased from 15 mills to fulfill his contracts with this Buyer, and of these mills 8 were on strike for certain periods; that the capacity of these 15 mills was about 24,200,000 bags, and the capacity of the 8 in which there were strikes was 17,000,000 bags, or about 70 per cent, and the capacity of the mills in which there was no strike was 7,200,000, or 30 per cent.

In discussing the important issues raised in this arbitration, the arbitrators said:

"Inasmuch as Buyer's contract does not specify from which mills the bags were to be supplied, it was optional with Seller as far as Buyer was concerned, to buy from any or all of the mills in Calcutta. Buyer had no say in the matter, was not consulted and never had

notice which mills were to supply the contracts. That being so, it was only a general strike that could affect the contracts of Buyer, and there is ample evidence to show that there was no general strike.

"Buyer claims that he was entitled to notice of strikes within 7 days according to the contract, but Seller did not give any such notice until the 19th of April, who claimed that notice need not be given until practically the end of a strike as he could not tell whether the goods would be delayed or not. In our opinion, that has no bearing on the matter at all, inasmuch as the Committee finds, as above stated, that there was no general strike and that therefore no notice could be given because a notice from one or several mills would not be sufficient to exempt Seller from shipments from Calcutta under the terms of the contract.

"The Committee has given the question of strikes very serious consideration and from all the evidence which has been put before us, while we are satisfied that there were *labor troubles* during the summer season of 1912 and only a few of the mills issued what is known as a strike notice to cover this, the Committee rules that a shortage of labor was not covered under the contract which existed between Buyer and Seller as a shortage of labor is a prevalent thing with the Calcutta jute mills during the hot season, which representative of the Seller admits. The Committee desires to distinguish between *labor troubles,* which might and do include shortage of workmen, and a *general strike.* The latter only could affect the contract as worded between the two parties.

"We find that Buyer purchased 707 bales at a cost of $77,632.50 for delivery against contracts he had made for the July delivery with the expectation of receiving the goods which were sold him by Seller, and the total price for which he had contracted to sell these bags was $57,730.50. The Committee confirmed, by inspection of the contracts and books of Buyer, the correctness of his contracts to sell these 707 bales and the prices he was to receive for same, and the correctness of the prices paid by Buyer for bags purchased to fill contracts on account of late shipments of Seller's shipments. The difference between the forced purchase price to fill said contracts and that which he received from the buyers for said contracts was $19,902, which amount is hereby awarded to Buyer to be paid by Seller as the total damages sustained by Buyer on account of late shipments by Seller.

"As regards the claim of Buyer for the alleged profit which he expected to make on 200 bags of grain bags bought on February 3rd and March 29, 1912, which he stated he should have been able

to sell at 11½ cents, but which he was obliged to deliver against contracts already entered into on account of late shipments of Seller, the Committee is of the opinion that this claim is not justified as the profit claimed was prospective, and there is no evidence to show that Buyer suffered actual loss on the price at which these bags were sold.

"Buyer's claim for the delay on all other shipments is disputed by Seller on the ground that delivery of same was taken by Buyer's acceptance of the drafts; that no protest was lodged with Seller or his representative; that he should have received notice from Buyer that the bags would be held for account of Seller. These goods were taken delivery of by Buyer and held by him for months before any notice whatever was given to Seller or his representative, although he well knew that there was a delay in the shipment. The Committee finds that Buyer failed to notify Seller and therefore that he had no claim against Seller on this account.

"Aside from the short shipments occasioned by the so-called strikes, both sides brought up many points in reference to the prices prevailing just prior and subsequent to the arrival of the delayed shipments, claiming that this had a bearing on the matter. While the Committee has carefully considered this and other points raised by both sides, it is not necessary to dwell thereon herein as we consider they have no bearing on the matter in controversy, the same having been decided on the point of the goods having been accepted by Buyer without protest. (San Francisco Chamber of Commerce Arbitration, 1913.)

Affirmed on Appeal, but Amount of Damages Reduced—This matter went to appeal, the arbitrators on appeal saying:

"First. Your Committee agrees with the Arbitration Committee that "*strikes*" within the meaning of the contracts, did not prevent the fulfillment thereof, and agrees with said Committee in making a distinction between *labor troubles* and *strikes*.

"Second. Buyer having been advised by cable on April 19th by Seller that there would be delay in the shipment of 1,000 bales, April, owing to strikes, found it necessary to cover (at that time for his own account on the supposition that a more or less general strike in the Calcutta mills existed) sales to the amount of 907 bales which he had made against this expected April shipment of 1,000 bales.

"Third. Buyer then purchased in this market 707 bales of Standard Bags at a cost of $77,632.50. Buyer had in store 200 bales which he also delivered to his customers to fill the sales of 907 bales which he had made. We base the value of these 200 bales the same as the 707

bales; hence if 707 bales cost $77,632.50, 907 bales would cost $99,593.50. Buyer had sold these 907 bales for delivery in July, for the sum of $74,070.50, which, deducted from the forced purchase price of $99,593.50, leaves a net cash loss of $25,523, which sum we now award to Buyer.

"Fourth. Buyer is entitled also to the profit he would have made by contracts entered into if Seller had shipped the 907 bales within contract time, which profit figures $11,759.60. This sum we also award to Buyer.

"Fifth. Having thus placed Buyer in the same position, so far as dollars and cents are concerned, as he would have been in if his 907 bales, April shipment, had arrived on time, we award to Seller the difference between the average cost price of the bags and the estimated value at a reasonable time after their arrival, which difference we place at $23,250.00 and this sum we award to Seller.

Sixth. Summing up the case:

Seller is to pay Buyer as per paragraph 3	$25,523.00
Seller is also to pay Buyer as per paragraph 4	11,759.60
Total	$37,282.60
Whereas	
Buyer is to pay Seller as per paragraph 5	$23,250.00
Leaving in favor of Buyer	$14,032.60

and interest on this sum at 6 per cent from August 1, 1912, to the date when this claim is settled, which interest is also awarded to Buyer. (San Francisco Chamber of Commerce Arbitration, 1913).

Dissenting Opinion—The following dissenting opinion was filed: "I concur with the first, second and third items in the foregoing decision.

"I also concur in the decision, that Buyer has no claim against Seller on account of the delayed shipments of grain bags involved in this dispute other than the aforesaid 907 bales.

"I dissent from the foregoing decision as regards the fourth, fifth and sixth items, as I believe that Buyer is entitled to the full amount of his net cash loss on the 907 bales repurchased in the local market as his total damages in this case, which amount is $25,523."

Damages Allowed for Late Shipment When Buyer Purchased in Other Market for Seller's Account, After Notice — Strike Clause Fully Interpreted—A San Francisco Buyer purchased from a Calcutta merchant, 4,750 bales of Standard Calcutta **Grain Bags,**

1,000 bags to the bale, the contracts being made in November, 1911, and in January, February and March, 1912. Shipments in dispute were to be made as follows: 700 bales in March, 1912; 1,700 bales in April, 1912; 1,200 bales in May, 1912, making a total of 3,600 bales to be shipped in the months named. Each contract specified the month of shipment from Calcutta, C. I. F. San Francisco.

The following clause was in the contracts:

> "Delays caused by damage or accidents to the mill or factories or strikes or pestilence among the workmen engaged therein on goods for the above contract to be excepted. In the event of any portion of this contract not being shipped in terms thereof, the right of Buyers to cancel, reject or claim, is to the unshipped portion only. Buyers to accept any portion shipped in accordance with contract. Sellers must notify Buyers within seven (7) days of such delay."

The contracts did not specify any particular mill or mills from which the Seller was to procure the bags.

Under date April 19, 1912, Seller cabled Buyer that the April shipment would be late owing to strike, and advised later that he expected to ship by May 20th. Buyer then sent the following cable:

> "Ship when ready. Please ship our goods as early as possible each month. The result is most disastrous if you have not shipped in good time. We have sold against April shipment. We cannot provide against strike when selling."

Seller replied to this as follows:

> "Please refer to contracts terms. We will not be responsible. We will do our best."

The immediate reply by Buyer was as follows:

> "We extend the time of shipment. You may ship when ready. Try hard to finish S. S. "Nainsang" 17th day of May."

Buyer claimed that his extension of time was only until May 20th on the shipment to have been made in April, but the arbitrators said in this regard: "By no stretch of the imagination can we conceive that the time was extended only to May 20th."

Buyer contracted to sell bags for July delivery against the March and April shipments. By the end of April there were 1,160 bales of April shipment unshipped and by the end of May the late shipments for April and May shipments amounted to 1,524 bales. Having extended the time on only 500 bales, Buyer gave notice to Seller's San Francisco agent that Seller would be held responsible for damages

for late shipments. Seller again disclaimed responsibility for the delay. Buyer purchased "for the account of whom it might concern" in the local market 1,449 bales to protect his sales contracts for an equal quantity to be delivered in July, the cost being $155,055.01, an excess of $53,483.11 over the cost of the same quantity of bags contracted for from the Calcutta Seller. To the excess amount Buyer added $4,011.25 in interest, and filed a claim with the arbitrators for the total of $57,494.66.

Seller averred that there were strikes in Calcutta in April, 1912, and that these strikes prevented him shipping the 500 bales in April on which an extension of time had been granted. He further claimed that Buyer took delivery of all the shipments for Buyer's account and sold the same.

There are 41 mills in Calcutta (1912) of which about 25 make wheat bags and have a capacity of 43,400,000 bags per year, and the other mills are equipped with machinery to make such bags, so it is possible for them to do so in case of emergency or if the inducements offered were sufficient. Of the 25 mills the evidence showed that there were strikes in the following four mills:

Hastings, on strike from April 12 to April 27.
Haoghly, on strike from March 13 to April 9.
Anglo-India, on strike from March 25 to April 1.
Belvedere, on strike from April 9 to April 29.

Three other mills, namely Nailati, National and Clive, also had strikes, but the duration thereof was not in evidence. The evidence showed that the employes of only seven mills out of 25 were on strike, and there was nothing to indicate that the Seller had used his best endeavors to procure about 500 bales for April shipment from the mills not on strike. On the question of whether there was a strike of a general nature and the Seller thereby relieved under the clause quoted in the foregoing it was

Held, That there was no general strike among the Calcutta mills during the period covered by the contracts, and that as the contracts did not specify any particular mills from which the bags were to be procured the Seller was bound to procure these bags from any source and to ship on time, even though he might have to pay a higher price therefor than he expected to pay when he contracted to sell them to Buyer, unless he had shown his inability to secure bags from any source. Further, that the extension of time given by Buyer to Seller was made under a misapprehension and incorrect statement of strike

conditions in Calcutta during April, 1912, and the same was of no force and effect and did not relieve Seller from his obligation to ship said 500 bales in April and that Buyer is entitled to damages for the delay in shipment.

The arbitrators allowed the Buyer the actual cash loss sustained through the purchase of the 500 bales in the local market, which loss was $16,400; Seller was directed to pay Buyer the actual loss on 949 bales repurchased, or $31,127.20. Buyer was directed to pay Seller the remainder of the profit on 949 bales late shipped, which left $21,032.55 as damages to be paid by Seller to Buyer. (San Francisco Chamber of Commerce Arbitration, 1913).

Affirmed on Appeal, but Amount of Damages Reduced—On Appeal, the arbitrators affirmed the award of the original arbitrators that no general strike existed at Calcutta in April, 1912, but allowed the Buyer $17,495.84 as total damages. (San Francisco Chamber of Commerce Arbitration on Appeal, 1913).

Force Majeure as Affecting Time of Shipment—Cargo Shut Out by Carrier Shipped on Later Vessel—Buyer's Responsibility Under C. I. F. Contract—Bill of Lading Subject to Mate's Receipt—A sold to B a quantity of whole **Coconuts** for shipment in bulk during the month of August from Manila to New York, under a C. I. F. contract, except as to a clause reading as follows: *Rottage in excess of 5 per cent for account of Seller.* Shipment was made in two lots by separate vessels, as hereafter set forth, and upon arrival at New York, the goods were rejected, Buyer alleging as to one lot, that the nuts were virtually all rotten, and as to the other lot that shipment had not been made within contract time. The question of rottage was involved in this shipment also.

The entire lot of coconuts, approximately 300,000, was tendered to the S. S. "Akita Maru", and bill of lading stamped *subject to production and condition of mate's receipt* was issued at Manila August 30, 1920, and negotiated the same day by Seller. During the process of loading, a typhoon occurred, three cascos were sunk, and the nuts on three cascos were more or less exposed to the storm and rains before loading aboard the vessel. Subsequently the vessel shut out a portion of the shipment, and the mate's receipt covering those shipped had endorsed thereon *all in bad order.* The remainder of the cargo, except that lost in the typhoon, was shipped per a subsequent steamer, the "Cape May," on October 1, 1920.

Upon submission to arbitration, Seller contended that as the contract was C. I. F., responsibility of Seller terminated upon tender to carrier and issuance of a bill of lading for the shipment. Buyer set up that the coconuts, having arrived sprouted and rotten, he was not required to take delivery thereof, and was entitled to recover the full amount of the invoice which had been paid, together with interest from date of rejection to date of repayment. And, furthermore, he stressed the claim that the shipment ex the S. S. "Cape May" was not effected in August, but that bill of lading was dated October 1, 1920. In response to this contention, Seller claimed that Rule 2 of the Foreign Commerce Association of the Pacific Coast, (the contract being the uniform form of that Association), provided for the contingency which resulted directly from the typhoon of August 30th, that he was relieved of responsibility for delayed shipment and was clearly within his rights in shipping per the next available steamer.

As to whether the contract was strictly C. I. F. the arbitrators said:

> "As to the contract being strictly C. I. F.: The so-called 'rottage' provision undoubtedly was intended to cover the coconuts at point of destination. Otherwise it would have no effect whatsoever, for it would not be reasonable to assume that Seller had a right to load a shipment containing 5 per cent rottage. Inasmuch as the contract specifically provided in one of the typewritten clauses for inspection in accordance with the rules of the Foreign Commerce Association, and such rules do not apply at the port of Manila, it is evident that the place of inspection was intended by the parties to be at port of arrival."

Having thus determined that the so-called "rottage clause" of the contract applied at New York, where the inspection was to be made by Buyer, the arbitrators considered the condition of the nuts as revealed by the official sample and inspection made at New York under the supervision of an official inspector of the New York Produce Exchange. This inspection showed the nuts to be far in excess of five per cent of rottage, specified to be for account of Buyer.

Held, That as practically the whole shipment was in rotten condition or otherwise in bad order when tendered, due to the shipper having permitted loading in poor condition, Buyer was entitled to reject the whole shipment and to reimbursement by Seller of the entire price paid for the goods, and costs of whatsoever nature were assessed to Seller.

Further, the arbitrators said:

"In view of the condition of the coconuts on arrival, the arbitrators are of the opinion that it is unnecessary to go into the feature of time of shipment." (Foreign Commerce Association Arbitration No. 33, 1921).

Award Reversed on Appeal, and Time of Shipment Fixed—From this finding and award, Seller appealed, alleging that the arbitrators had erred, and claimed (1) that under Rule 9 of the Foreign Commerce Association, August shipment was effected; (2) that as the contract was on C. I. F. terms, title passed to Buyer when shipment was effected, and the nuts were at Buyer's risk; (3) that damage was caused by the typhoon after shipment was made and title had passed, and the damage caused by the act of the captain, after receipt of the nuts and issuance of bill of lading, in shutting out the nuts, was for the account of Buyer, since title had passed to him. Seller alleged error on the part of arbitrators in assessing charges accruing at New York by reason of Buyer's refusal to take delivery of the shipment ex S. S. "Cape May." In any event, it was claimed Buyer had expressly assumed in the contract the risk of 5 per cent of rottage, which had been disallowed by the arbitrators. Objection was also made because the arbitrators failed to decide the issue as to time of shipment, and the operation of contingencies beyond Seller's control, namely, the typhoon and the subsequent shutting out of a portion of the cargo by the first carrier, the S. S. "Akita Maru." The arbitrators on appeal discussed the entire transaction, and materially modified the findings and award of the lower board. Because of the importance that attaches to the principles involved in the matter, the entire findings and award by the arbitrators on appeal are given herewith, as follows:

"Because the arbitrators below, all of whom as well as the disputants were unknown to us throughout this arbitration, went outside the express contract provision in their award, without finding that fraud had been perpetrated by either party to the contract, which, in our opinion, would be the only justification therefor, it is fitting, we believe, to briefly set forth the principles that should govern arbitrators in the consideration and determination of differences. These principles, briefly stated are:

"(1). That upon which the minds of the parties to a contract in writing have met is to be arrived at, if possible, from the conditions and provisions of the contract, assuming that the contract is not in any way in violation of the laws of the country.

"(2). All the conditions and provisions of a contract are to be given full force and effect.

"(3). The substantial legal rights of the parties are to be ascertained and recognized, but where the arbitrators are in doubt as to what was intended by the parties, or where a purely technical construction of the conditions or provisions of the contract would defeat the obvious purpose of the parties thereto, it is the duty of the arbitrators to determine such matters equitably, having regard for all the circumstances of the case.

"All the members of the Committee on Appeal have perused and considered the facts set forth in the award of the committee below, and in all the documents in the premises, which include all the papers and statements in writing that were placed before the lower committee, and have concluded that the committee below erred in its findings, except as regards the point at which inspection was to be had and percentage of 'rottage' determined; and in all other matters covered by the award of the lower committee they find as follows:

"First. That it appears from all the evidence in the premises that Seller and Buyer acted in the utmost good faith; and, in consequence, the contract between the parties, in considering the matters in difference, has not been voided in any way, but the provisions thereof are to be given full force and effect.

"Second. That Seller by obtaining bill of lading dated August 30, 1920, for 317,000 coconuts—it appearing that said bill of lading was obtained in every particular in the utmost good faith—made *August* shipment as provided in the contract. It is fully established that the practice of rubber stamping bills of lading in Manila "*Subject to Production and Condition of Mate's Receipt*," as the bill of lading in question was stamped, or words to the same effect, was and is customary, and that steamship companies were and are in the habit of issuing bills of lading to shippers before mate's receipts have been given. However, if it be argued that in consequence of the clause stamped on the bill of lading that *August* shipment was only made of the quantity for which mate's receipts were finally obtained for shipment on the "Akita Maru," namely—126,670, then we hold that, as the failure of the "Akita Maru" to take the entire 317,000, according to the Captain's statement, which is not denied, was due to the damaged condition of the nuts—wet condition occasioned by the typhoon that occurred on August 31st and which wrecked two of the lighters and stranded another on which the coconuts were for which aforesaid bill of lading had been given—the typhoon was the immediate and direct cause of the delayed

shipment of the coconuts, which finally went forward on the S. S. "Cape May"; and, as the 'Casualty Clause' relieves the Seller from late shipment when so occasioned, the Seller actually complied with the conditions of the contract as to time of shipment. Regarding the action of Seller in allowing 140,800 nuts, which might have been damaged during the typhoon, to go forward per S. S. "Cape May", we cannot help but feel that, inasmuch as he was responsible for all damage at destination in excess of 5 per cent of the total shipment, he must have acted in accordance with his best judgment. Moreover, the report on the "Cape May" nuts in regard to condition was slightly better than on the "Akita Maru".

"Third. The contract expressly provides that rottage in excess of 5 per cent of the quantity of coconuts called for, or that may be shipped in execution of the contract, is for account of Seller. Hence, if all the coconuts in question were rotten on their arrival in New York, the Buyer having undertaken to be responsible for rottage up to 5 per cent, could not properly be relieved from such responsibility, of which the Buyer was perfectly aware as proved by his letter of December 8th and his telegram of December 4th reading in part: *We shall use our 5 per cent for Copra.* Therefore, in this connection we find that the Buyer should pay the Seller for 5 per cent of the invoice value of all the coconuts shipped, the rottage in same exceeding 5 per cent.

"Fourth. As to what should properly constitute rottage the committee called for expert advice, and found, that, while 'rottage' might have a technical meaning, from an equitable standpoint coconuts to be used for dessication must not be rancid, spotted or rotten, but that small sprouts would not render them unfit for the purpose for which they were imported. It appears from the findings of the Bureau of Chemistry of the New York Produce Exchange, and such findings are not contradicted, that out of the 1,000 coconuts ex S. S. 'Akita Maru:' "

Not cleaned— 4—sprouted, not rancid, spotted or rotten,
Not cleaned— 6—not sprouted, spotted, rotten or rancid,
Cleaned— 2—Perfect,

Only 12 coconuts were fit for dessication;
and out of the 1,000 ex S. S. "Cape May":

Not cleaned— 3—not sprouted, rotten, spotted or rancid,
Not cleaned—22—sprouted, no spots, rots and not rancid,

Only 25 coconuts were fit for dessication;

or 1.2 per cent of the quantity shipped on the "Akita Maru" (126,670) did not have rottage in them, and 2.5 per cent of the 'Cape May' shipment were free from rottage; hence Seller should be paid invoice price for 1.2 per cent of the 'Akita Maru' shipment in addition to the 5 per cent of the shipment, which, because of rottage, is to be borne by Buyer, and invoice price for 2.5 per cent of the 'Cape May' shipment in addition to the 5 per cent of said shipment to be borne by Buyer because of rottage.

"Fifth. Shipment having been made by the Seller in contract time, Buyer was obligated to take delivery of the coconuts shipped on the 'Akita Maru' and the 'Cape May' and ascertain the percentage of rottage therein, and was only entitled to claim on Seller on account thereof for whatever rottage there might be in the coconuts on inspection of same as provided in the contract on arrival of the coconuts in New York, in excess of 5 per cent; and that all expenses necessarily incurred in consequence of Buyer's failure to receive the coconuts in execution of the contract are properly chargeable to Buyer. We find the expenses in this connection properly chargeable to Buyer to be $1,697.73 (the arbitrators then enumerate in detail the various items of expenses).

"We find that each party shall pay his own telegraph expenses in connection with this controversy, and that the Seller shall defray solely the hire of his New York representative. We so find as regards these two items because, while we do not question the propriety of Seller having a representative in New York, or Seller or Buyer incurring the telegraphic expense that was incurred by them, such expenses were not necessarily incurred on the part of either Seller or Buyer.

"Sixth. It necessarily follows from the conclusions we have reached herein as regards shipment that Buyer should pay contract price for the coconuts lost during the typhoon, and that Buyer is entitled to recover from the underwriters whatever may be collected from them on account of the loss of said coconuts.

"Seventh. On December 20, 1920, rottage on the nuts was determined by Robert W. Rouse & Co., of New York, and on the basis of such determination Seller is responsible for 93.8 per cent and 92.5 per cent of the shipments on the 'Akita Maru' and the 'Cape May,' respectively. The arbitrators make the following findings and award:

"First. That the Buyer is entitled to repayment of 93.8 per cent of the C. I. F., selling price of the 126,670 coconuts ex S. S. 'Akita Maru' at $59 per thousand, i. e. $7,010.17.

"Second. That the Buyer is entitled to repayment of 92.5 per cent of the C. I. F. selling price of the 140,800 coconuts ex S. S. 'Cape May' at $59 per thousand, i. e. $7,684.16.

"Third. That Seller is entitled to deduct from the two foregoing payments the sum of $2,755.42, being the difference in freight as deducted from Seller's original invoice dated August 30, 1920, amounting to $4,255.42, and the total amount of freight paid by Buyer, $1,500.

"Fourth. That Seller is entitled to deduct from the above payments, a total sum of $1,697.73 to cover charges incurred on the 'Cape May' shipment as allowed in the fifth paragraph above.

"Fifth. Interest is to be computed at the rate of 6 1-2 per cent per annum on the net amount of this award, $10,241.18, from December 20, 1920—the date of the determination of rottage—until date of payment. On charges incurred which are being allowed Seller, the dates of disbursement being unknown, interest is computed from the same date, December 20, 1920, as well as on rottage for which Seller is to pay Buyer." (Foreign Commerce Association Arbitration on Appeal No. 33A, 1921).

Calms, Heavy Weather, Swells, Etc. Not "Accident" Within the Meaning of Copra Contract Casualty Clause—A sold B a full cargo of **Copra** per S/V "C. D. Bryant" from Tahiti August-September loading. The vessel was not loaded in August or September and Buyer rejected the cargo on arrival at Pacific Coast port of entry on the ground of late shipment. Seller claimed that delay was due to calms, heavy weather, swells and slow discharging at Guam and the vessel was thereby delayed and that this came under the contingencies specified in paragraph four of the contract.

Held, That by no stretch of the imagination could any of these causes be construed as an *accident.* It is a well known fact that on nearly any off shore passage of a sailing vessel it is usual to have some light winds, calms, swells and gales, but these are not *accidents.* Had the vessel been dismasted or damaged in a material way then it would have been an accident, which, under the contract, would have extended the loading time sixty (60) days. Had the clause *or any contingencies beyond Seller's control* been included in paragraph four our decision would have been different. It has been shown that Seller had a cancelling date under the charter party of September 30th and could have consulted Buyer as to his wishes in case the vessel did not make loading port in time; but this was not done and Buyer had no opportunity of accepting a later date or extending the time for loading. We have taken into consideration the fact that the contract, as originally

presented by Seller to Buyer, contained the word *expected* August-September in the clause designating time of loading, and that Buyer took exception to the word *expected* and asked for its elimination, which was done by Seller. Therefore, a *definite* date, namely August-September, is fixed under the contract, there being no other conditions in the contract applying. Rejection by Buyer is sustained. (San Francisco Chamber of Commerce Arbitration, 1919).

Breakdown of Vessel's Engine Excuses Delay in Shipment of Copra—Failure to Reach Loading Port on Time—Delay Not Beyond 60 Days—A Pacific Coast importer sold to an Eastern manufacturer a quantity of **Copra** to be shipped "November-December-(1918) January (1919) from Sydney, Australia, or South Sea Islands, Seller's option." The shipment was not made in either of the specified months, but was made February 6, 1919, per the power vessel "H. C. Hansen." Upon arrival of the vessel at Pacific Coast port of entry, Buyer rejected the copra on the ground that Seller had breached the contract as to time of shipment. Seller claimed that the delay in shipment was due to a breakdown in the engine of the vessel, which had unduly delayed the passage from Melbourne to Tonga. As a result of this breakdown and continued trouble with the motors, the passage from Melbourne to loading point had occupied a little under three months, whereas under ordinary conditions the passage would have been made in thirty-five days. Seller especially pleaded the following clause in the contract:

> "Seller shall not be responsible to Buyer for delayed or non-shipment directly or indirectly resulting from a contingency beyond his control, such as embargo, act of government, strike, fire, flood, drought, hurricane, war, insurrection, riot, explosion, epidemic, pestilence, earthquake, accident, perils of the sea, tidal wave, or any other contingency beyond Seller's control not herein enumerated. If, due to any of the causes provided herein, shipment by steamer is not made within two months or by sailing vessel within three months after the contractual time for shipment, contract shall terminate with respect to any goods not then shipped."

Buyer contended that Seller should have made the shipment from Australia and thereby been within the contract period.

Held, That the evidence shows that there was not only one breakdown, but that there was a series of break-downs in engines of the "H. C. Hansen" on the trip from Willapa to Melbourne and also

continued engine trouble on the trip from Melbourne to Tonga and that the delay in making shipment at Tonga before the end of January, 1919, was due to said breakdowns in the engines which made necessary the use of sail power in order to make progress.

We have ascertained from the San Francisco Board of Marine Underwriters that they caused the "H. C. Hansen" to be examined prior to sailing from Willapa and gave certificate that the vessel was in good condition at the time for the voyage.

We decide that in accordance with the evidence in this case the breakdown in the engines was an accident within the meaning of clause four (above noted) of the contract in question, and the delay therefrom not having been for more than 60 days from January 31, 1919, we find that the Buyer is not excused from taking delivery and we decide this case in favor of Seller. (San Francisco Chamber of Commerce Arbitration, 1919.)

Seller Not Responsible for Car Shortage When Specifically Exempted—A sold to B three cars of Aberdeen **Lump Coal.** Buyer requested at the time of the contract that one car be shipped before Aug. 15, 1920, on which date the freight rate would be advanced. The sale was made verbally and confirmed by Seller July 28, 1920, the confirmation containing the following clause:

"Shipment to be made: *First car August 12th, balance ten days apart. All orders, contracts and agreements are contingent upon strikes, car supply, shortage of labor and other delays unavoidable or beyond our control.*"

The first car was not shipped until August 28th. When Seller received payment for the first car he found a deduction had been made of $81.60 for the freight advance after August 15th, Seller having rendered bill with the advance in freight included. Seller denied the right of Buyer to deduct this advance in freight, claiming that the coal was sold F. O. B. mines and that the delay was beyond his control and that Buyer knew of the conditions regarding possible delays specified in the acknowledgment of the order and had made no objection to same.

Held, That Seller was unable to make shipment on August 12th because his suppliers at the mine were unable to ship on that date or before August 15th, owing to car shortage, six days having been lost in August on that account, which delay was beyond Seller's control.

The Seller's Preference List dated August 2nd and sent to his mine supplier only five days after the sale was made, orders preference to be given to shipment on August 12th of the car in question.

As the Coal was sold F. O. B. mines and the mine was unable to ship the first car on August 12th, although Seller's order and Preference List to the mine specified that date for its shipment, we find that under the conditions in the acknowledgment of the order Seller is not liable for the delay, as we feel it was beyond his control.

We decide that the extra freight is for the account of Buyer and that Buyer shall pay the invoice price of $209.70 for the first car of coal, with interest at 6 per cent from September 10, 1920, until said payment is made, and that such payment shall constitute full settlement of all claims in this case. (San Francisco Chamber of Commerce Arbitration, 1921.)

Cancellation of Vessel's Sailing Not Force Majeure Under Contract Providing January-February Shipment—Late Delivery Not Allowed—A sold to B two hundred (200) bags of **Mandheling Coffee,** F. A. Q., ex dock San Francisco, net arrival weights, actual tare. Shipment was to be January–February, 1921, from Dutch East Indies by vessel or vessels, or railroads to San Francisco, unless otherwise specified. Buyer claimed that ninety-six (96) bags were delivered within the contract period, but that the balance, one hundred four (104) bags, was not so delivered. Seller, while admitting non-shipment within contract period, maintained that his failure to deliver was due to the steamer upon which the coffee was to be shipped having been withdrawn. Seller set up that the withdrawal of the steamer was an "*unavoidable interruption of transportation*" within the meaning of Clause 71 of the contract and should excuse the delay in delivering and, having shipped the coffee on another steamer, beyond the contract period, he was entitled to make later tender.

Buyer denied the validity of the reason given for non-shipment, declaring that there were steamers leaving during the contract period for shipping.

Held, That *force majeure,* as provided for in Clause 71 of the contract, does not apply in this case and withdrawal of the last steamer to sail in February does not relieve Seller from liability for delay in shipment as Seller had both January and February in which to ship, and it has been shown that other vessels were available for shipment during those months.

We decide that Seller is in default in not making shipment as per contract and Buyer is entitled to an allowance for loss of profit caused thereby as coffee for immediate delivery is not available in San Francisco.

The last steamer sailing from Dutch East Indies in February arrived in San Francisco April 6, 1921, and we fix 24 cents per pound as a fair market price for the coffee in question on that date and decide that Seller shall allow and pay to Buyer the difference between the contract sale price, 20 cents less 2 per cent and 24 cents less 2 per cent per pound on the amount of undelivered coffee in question. (San Francisco Chamber of Commerce Arbitration, 1921.)

Buyer, Consenting to Late Shipment, Cannot Thereafter Reject for Such Cause—Cancellation of Portion Does Not Extend to Entire Quantity—A sold to B a quantity of Chinese **Shelled Peanuts** under a contract specifying December-January shipment from the Orient. Prior to shipment, Seller advised the Buyer that shipment would be delayed, without assigning any valid excuse therefor, and Buyer acquiesced in the delay to the extent that he did not cancel the entire contract because of late shipment but cancelled as to 400 bags only, and consented to the shipment of the remainder. Subsequently, Buyer attempted to reject the entire delayed shipment. The Seller contested the cancellation, and showed that under date of March 16th he had advised Buyer of the delay in shipment, and on the following day Buyer advised that he would cancel 400 bags, leaving 600 bags to be delivered. On March 17th Buyer asked to cancel 200 additional bags, and on the 18th requested an additional cancellation of 100 bags, leaving 300 bags to be delivered.

Held, That the evidence clearly showed that while shipment had been delayed beyond the contract period, Buyer had expressed his willingness to accept a portion of the original contract quantity, although he had a right when put upon notice to cancel the whole contract, and having failed to so cancel he is obligated to take delivery of 600 bags. (San Francisco Chamber of Commerce Arbitration, 1920).

Shipping Instructions Do Not Control Shipment—Buyer Cannot Sustain Claim for Delay When Shipment Is Made Within Contract Time—A San Francisco merchant sold to a rice mill at the same place 1,000 pockets Choice California **Rice,** F. O. B. cars, December-January-February shipment. January 8th the Buyer gave shipping instructions, which were not acknowledged by Seller, and on February 13th, Seller presented his invoice and bill of lading dated in February. Buyer rejected the tender on the ground that there had been a lapse of five weeks between the date shipping instructions had been given and the date of shipment, which he claimed was an unreasonable delay and gave him the right to reject.

Held, That contract called for December-January-February delivery, and Seller having tendered proper delivery, Buyer is obliged to accept. (Rice Association of California Arbitration No. 29, 1920).

January "Received for Shipment" Lading Not Conclusive Evidence of January Shipment—Viseed by Cuban Consul at Later Date and Surveyor's Certificate Issued Subsequently— A sold to B 240 tons of Siam Usual **Rice,** December-January shipment from Hongkong to Cuba. There was delivered against the contract 140 tons, and Buyer rejected the documents covering the remaining 100 tons on the following grounds:

(1) Although dated January 31st, there was an apparent discrepancy in the bill of lading, the usual wording having been changed from "shipped in apparent good order and condition" to "Received for shipment", etc.

(2) The bill of lading was not viseéd by the Cuban Consul until February 9th, nine days after its issuance.

(3) The Hongkong Surveyor's Certificate indicated that the surveyor had attended at the godowns to examine the cargo from February 6th and the final certificate was dated February 11th, indicating that shipment was not made in January.

Seller contended that his documents were in order, the bill of lading reading *received for shipment bound to be transported by Steamer St. Andrew,* and that it was evident that his supplier had booked the space for shipment in January, and through some unavoidable cause was unable to ship so as to conform literally with the contract. Inasmuch as the contract provided that Seller *shall not be responsible for delays or any other unavoidable causes beyond Seller's control*, the delay was excusable.

Held, That the bill of lading, notwithstanding it is dated January 31st, does not constitute January shipment, as it is apparent from the change in the printing of said bill of lading from *shipped in apparent good order and condition by* to the notation in ink reading, *received for shipment from* and also the change on the second line *St. Andrew now at Hongkong,* to *St. Andrew from Hongkong* that the steamship company knew the goods could not be shipped in January, which is borne out by Lloyd's Register, which shows that the "St. Andrew" did not arrive in Hongkong until February 3rd. We have examined several sets

of documents for the same boat, none of which show changes as mentioned above.

This evidence, combined with the fact that the Hongkong surveyors certificate states that the surveyor did not attend the godowns until February 6th, convinces us that the shipment was not made within the time specified in the contract, and we therefore decide that the Seller has not made a proper tender of the One Hundred (100) tons in question and consequently Buyer is not obligated to accept this Rice. (Rice Association of California Arbitration No. 25, 1920).

Dissenting Opinion—One of the arbitrators dissented from the foregoing opinion, and gave the following reasons therefor:

> "All the bills of lading of the prominent steamship lines read not *shipped in apparent good order* but *received in apparent good order for shipment.* I contend that the date of the lading is final."

(Dissenting Opinion Rice Association of California Arbitration No. 25, 1920).

Shipment Defined—Delay in Shipment Permitted When Contract Provides for Variation in Time—When New Evidence Will Be Received by Arbitrators on Appeal—A Pacific Coast importer sold to a Pacific Coast Buyer a quantity of **Rice** for shipment from Hongkong in March, 1920. The contract contained a clause providing *variation of ten days in time of shipment or arrival not to constitute grounds for rejection.*

The bill of lading was dated April 12, 1922. Buyer rejected the goods on the ground that shipment was not made within contract period.

Held, That shipment, not having been made within contract period, rejection was sustained. (Rice Association Arbitration, 1920).

Reversed on Appeal—Seller subsequently asked for a reconsideration on the ground that new evidence had been discovered which would show that the rice in question was actually loaded on board the vessel on April 9th, notwithstanding the bill of lading was dated April 12th, and that under the variation of time clause in his contract he was permitted to make such delayed shipment. The Rice Association refused to entertain a reconsideration of the matter on the ground that the by-laws of the organization provided that rehearing could not be had after five days had elapsed. Thereupon the Seller appealed to the Committee on Appeals of the San Francisco Chamber of Commerce. The arbitrators on appeal said:

"As the by-laws of the Chamber of Commerce provide that arbitration proceedings shall be conducted so as 'to promote substantial justice' and Seller claimed that the new evidence was material and important and that non-consideration of this evidence would work a sacrifice of justice, the very thing a commercial arbitration is intended to avoid, the Committee decided that, to render substantial justice, the new evidence should be considered by them so that they might decide as to whether it was material evidence. Upon this situation being explained to the representatives of both parties at interest, who were present at the meeting, they both agreed that it would be satisfactory to them to have the Committee on Appeals consider the new evidence and waived any protest against consideration of such evidence in this case.

"The Committee then proceeded to examine the new evidence and found it to consist of the following:

"1st. An inquiry by cable dated June 24, 1920, from Sellers to their suppliers in Hongkong, as to when the rice was actually on board the 'Charlton Hall', that being the vessel upon which it was shipped. Suppliers by cable dated June 25th replied that the 2,000 bags in question were on board vessel on April 9th.

"Sellers also submit in evidence the original bill of lading with the following endorsement on the back thereof, by the representatives of the shipping agents for the 'Charlton Hall:'

> *"In accordance with cable instructions from the agents for S. S. 'Charlton Hall' we hereby certify as their representatives that goods covered by this bill of lading were actually loaded and shipped on April 9, 1920.*

"We find that actual delivery to a vessel and the goods being loaded on board constitutes shipment by a Seller and when it can be shown that this was done in any particular case within the required time, the date of the bill of lading need not be considered as date of shipment.

"We cannot disregard this official statement by shipping agent as to when the goods were actually loaded on board and must consider it as material evidence in this case. While the contract provides that shipment was to be 'March, 1920, from Orient to New York', it also contains the clause 'Variation of ten days in time of shipment or arrival not to constitute ground for rejection,' and if shipment were made by Sellers on or before April 10th Buyers could not reject the goods on account of late shipment.

"We decide upon the evidence before us that shipment was made within the ten days' extension of time provided in the contract.

"We therefore reverse the decision of the Arbitration Committee in this case and decide that under the terms of the contract Buyers are not entitled to reject the shipment in question." (San Francisco Chamber of Commerce Arbitration on Appeal from Rice Association of California, 1920).

Shipping

A shipper's agent, having consented, impliedly or otherwise, to stowage of **Tar** in the poop of a vessel, the shipper cannot sustain a claim for damage to the tar by reason of improper stowage. But the shipper and the time charterer each were required to pay one-half the cost of reconditioning the barrels, and one-half of any other known loss through wrongful stowage of the tar. (San Francisco Chamber of Commerce Arbitration on Appeal, 1912, Page 227).

A vessel is responsible for pilferage, for short delivery of actual cases, packages or pieces and for breakage, except for broken bottles and contents of same. (San Francisco Chamber of Commerce Arbitration, 1912, Page 227).

A carrier having a contract of affreightment covering **Sugar** is responsible for excess freight charges resulting from shutting out the cargo and forcing shipper to ship by another carrier. (San Francisco Chamber of Commerce Arbitration, 1918, Page 229).

When a charter party specifies the port of discharge of a vessel as "San Francisco (Cal.) U. S. A." the charterer cannot require discharge at Oakland without paying extra expense of shifting the vessel to Oakland. (San Francisco Chamber of Commerce Arbitration, 1920, Page 222).

Shortage in rail equipment whereby a charterer is prevented from unloading the cargo on cars will not release charterer of responsibility for demurrage on vessel. (San Francisco Chamber of Commerce Arbitration 1920, Page 222).

When **Lumber** is sold ex ship's tackles, the Buyer is responsible for State Tolls; and when the sale is ex dock, the tolls are for Seller's account. (San Francisco Chamber of Commerce Arbitration, 1919, Page 221).

The term "free berth" means a berth free of obstruction and ready to receive vessel and not free of expense. (San Francisco Chamber of Commerce Arbitration, 1916, Page 226).

When there is an excess quantity of **Laths** shipped, whereby the vessel's carrying capacity is decreased, the captain of the vessel must protest at the time of loading. It will be too late to protest after sailing, and claim for freight on the cargo space will be disallowed. (San Francisco Chamber of Commerce Arbitration, 1914, Page 223).

Under a charter party specifying discharge at Port of San Francisco, charterer may not order discharge at Port Costa without paying cost thereof, Port Costa not being a part of the port of San Francisco. (San Francisco Chamber of Commerce Arbitration, 1917, Page 223).

Any claim for short carrying of a cargo of **Copra** must be made at the port of shipment and not on vessel's arrival at destination. (San Francisco Chamber of Commerce Arbitration, 1918, Page 223).

Vessel Responsible for Short Delivery of Grain—Clean Bill of Lading Governs—A shipper of grain from Portland, Ore. to China Basin (San Francisco) and Port Costa made claim for short delivery against the vessel. The vessel failed to obtain a receipt for the grain delivered at China Basin. The evidence showed that 1,417,648 pounds of grain were received on the vessel and 1,401,490 pounds were delivered according to weights of the Grain Inspection Department of the San Francisco Chamber of Commerce, a shortage of 16,158 pounds. It was claimed by the vessel, supported by the evidence, that some of the bags in which the grain was shipped were second hand and sunburnt, but the bill of lading gave a clean receipt. The evidence further showed that the different lots of grain were not properly separated when stowed, so as to prevent possible mixing in delivery, a fact which undoubtedly caused some of the shortage.

Held, That the vessel should be allowed a deduction of the total shortage of ½ (one-half) of one per cent (1%) of 1,417,648 pounds, or 7,088 pounds, and in view of the clean bill of lading, the vessel is responsible for payment of the remainder, or 9,070 pounds. (San Francisco Chamber of Commerce Arbitration, 1917).

Responsibility for Demurrage—Inability to Obtain Use of Crane Does Not Excuse—Delay of Captain in Signing Bills of Lading—The owners of a schooner made claim against the charterer for demurrage incurred while loading the vessel at Newcastle, N. S. W. in performance of a charter party dated October 26, 1911. The charterer claimed that delay in loading was occasioned by his inability to obtain the use of a crane. The charter party contained this clause: *Vessel to be loaded in the usual and customary manner within fifteen colliery working days.* The charterer asserted that the provision in the clause of exceptions, *but in causes beyond the control of the charterers* absolved him from responsibility for demurrage, his failure to obtain the use of the crane for loading being beyond his control.

Held, That the foregoing exception clause cannot be made to apply to the delay in obtaining the use of the crane.

In the same matter, the charterer claimed one-day's demurrage allowance on account of the captain not having signed bills of lading within twenty-four hours after completion of loading, as provided by the charter party. The captain testified that he called frequently at the offices of the agents of the charterer on the day loading was completed and that bills of lading were not ready for his signature until 5:30 p. m. on that day; that, owing to the necessity of his filing protest with the United States Consul to protect his demurrage, he was unable to sign the bills until the morning of the next day.

Held, That the delay in signing the bills of lading was reasonable in the circumstances and the counter-claim of one day's demurrage was disallowed. (San Francisco Chamber of Commerce Arbitration, 1911).

Discharging Cargo at Salina Cruz—Meaning of Term "As Customary"—A vessel owner made claim for demurrage against shipper under a contract of affreightment, containing the following clause: *Discharge—To be discharged at Salina Cruz as customary at not less than Six Hundred tons per working day. Vessel to be berthed within five days after arrival at Salina Cruz.*

Held, That the words *to be discharged at Salina Cruz as customary* mean that Sundays, rainy days and legal holidays shall not be counted as lay days, and therefore the claim that Sundays and rainy days should be counted as working days is untenable and is disallowed. (San Francisco Chamber of Commerce Arbitration, 1912).

Responsibility for "State Tolls" Under Sale of Lumber Ex Ship's Tackles—Differentiation Between Terms "Ship's Tackles" and "Ex Dock"—A sold to B a lot of **Lumber,** ex a named vessel, as "now lying on wharf at foot of Twenty-fifth Street, San Francisco." This sale was in fulfillment of another agreement dated July 20, 1918. Seller charged Buyer the State toll on the lumber, claiming that the sale was "ex ship's tackles," and also for the charges incurred for rough piling. Buyer contested these charges, claiming that it was an impossibility for him to take delivery ex ship's tackles, the cargo already having been discharged. Buyer further pointed out that the State tolls had already been paid by Seller, or in any event he was responsible therefor.

Held, That Buyer could not take delivery at ship's tackles. Had Seller intended Buyer to pay these charges, the agreement should have provided that Buyer must pay accrued charges against the cargo. It would appear unreasonable to expect charges to be retroactive against Buyer, as for instance, if there had been fire insurance or wharf rental incurred and Buyer had been asked to pay same in addition to

sale price, and we feel Buyer was justified in believing, when he agreed to the increased price, that said price included expenses incurred by Seller for piling and tolls.

We cannot agree with Buyer's contention "that even under the original contract we were not liable for State Tolls" as it is the recognized custom of the port that a sale ex ship's tackles means that State Tolls are for Buyer's account when possession is taken at ship's tackles.

We decide that the sale of this particular lot of lumber, being made under the agreement of Nov. 1, 1918, which specified that the lumber was then on a certain wharf and that inspection of it would be made on said wharf before final acceptance, was ex wharf and not at ship's tackles and that the charges for piling and for State Tolls are for the account of Seller. (San Francisco Chamber of Commerce Arbitration, 1919).

When Charter Party Specifies Discharge at San Francisco, Discharge at Oakland Not Permitted Without Paying Costs —Commencement of Lay Days—Under a charter party which specified the port of discharge of a vessel as "San Francisco (Cal.) U. S. A.", the charterer desired the vessel to proceed to Oakland, on San Francisco Bay, for discharge. The owner claimed payment by the charterer of the extra expense incurred by reason of shifting the vessel to Oakland.

Held, That the vessel, under the wording of the particular charter party in this case, cannot be compelled to discharge in Oakland, California, as the charter party distinctly provides that she was to proceed to San Francisco and discharge there. The charterer shall therefore reimburse the owner for the extra expense incurred.

Another question in issue between the parties was:

> "Whether lay days shall commence to count 24 hours after vessel was ready to discharge or at the time discharge commenced, and how much demurrage vessel is entitled to receive, if any."

Held, That when a vessel commences to discharge prior to the expiration of the 24 hours' notice given by the master, lay days commence to count at the time discharge begins. Therefore, the owner is entitled to demurrage for two days and 20½ hours, viz.: £141:17:1.

A third issue was the claim of the charterer that the delay in discharge was due to a shortage in rail equipment, and because of a lack of cars he could not unload the vessel's cargo into cars.

Held, That shortage in rail equipment does not excuse the charterer from responsibility for vessel's demurrage. (San Francisco Chamber of Commerce Arbitration, 1920).

Excess Quantity Laths in Lumber Cargo—Captain Must Protest When Offered—Too Late When Loading Completed—Charter Party Should Be Specific—A vessel under charter to B loaded lumber at Gray's Harbor for San Pedro for the account of C. A, owner of the steamer, claimed that an excessive quantity of laths was shipped in the vessel and consequently the vessel's carrying capacity was decreased to the amount of about 90 M feet, for which claim was made for freight at $3.50 per M of lumber from the points named above.

B admitted that, if shipped, such a quantity of laths would be excessive, but claimed he had no knowledge of the quantity of laths shipped and that he had received no protest from A until after the vessel had been loaded and had sailed. It was contended that the captain of the vessel should have protested at the time the cargo was loaded and that B should have been notified so he might have taken some steps to protect his interests.

The captain of the vessel, when receiving cargo, did not protest to the charterers that there was an excessive quantity of laths offered. Under the charter party he could have demanded a full and complete cargo of lumber as fast as the vessel could stow it and failing to receive what would have been a proper cargo, demurrage would have accrued while the vessel was waiting to receive instructions from the owners whether the quantity of laths furnished should be accepted or not.

Held, That failing to protest at the time of loading the quantity of laths furnished, it was too late for the captain to make such protest after the vessel had completed loading and sailed, at which time he did file protest with the vessel's owners.

After making the foregoing award, the arbitrators said:

"We do not mean to imply that there is no limit to the quantity of laths that can be furnished in a full and complete cargo of lumber, as specified in Memorandum of Charter dated November 18, 1913, submitted in this case, but we consider the Charter Party faulty in not specifying the percentage of laths that could be shipped, and we recommend that all charter parties should specify the percentage of laths, and/or pickets, and/or shakes, and/or shingles which may be shipped as part of a cargo of lumber." (San Francisco Chamber of Commerce Arbitration, 1914).

Port Costa Not Part of Port of San Francisco—Charter Party Should be Specific—The charterer of a vessel carrying a cargo of nitrate to San Francisco ordered the vessel to discharge at Port Costa without paying extra cost therefor. The charter party and the bill of

lading gave San Francisco as the destination. The charterer maintained that Port Costa is recognized as being part of the Port of San Francisco, while the owner of the vessel insisted that this is not the custom, and claimed that where Port Costa was desired as a point of discharge it should be specified.

Held, That Port Costa is not recognized as part of the Port of San Francisco, and that it should be specifically covered in the charter party. Charterer shall pay all extra expense incurred by discharging at Port Costa. (San Francisco Chamber of Commerce Arbitration, 1917.)

Short Carrying of Cargo—Claim and Demand Must be Made at Port of Shipment—Use of Certain Space for Ship's Stores— The charterer of a schooner fixed to carry a cargo of **Copra** from Papeete to the Pacific Coast made claim against the owners of the vessel for reimbursement for his loss occasioned through the improper stowage of the cargo. Upon arrival of the vessel at San Francisco the charterer maintained that he had sustained damage because there was available space in the vessel which had not been utilized for cargo; that there was space aft of the bulkhead, located in the afterpart of the vessel, which was not used and that there also was unoccupied space forward.

Held, That any claim for short carrying should have been made at the port of shipment, where demand should have been made on the captain to fill the space claimed to be available, and if he refused to fill the said space, formal protest should then have been lodged. The captain gave up to cargo certain space to which he was entitled for his crew and ship's stores, which he was not required to do, and he was not required to use any space aft of the bulkhead as claimed by charterer, as it is not customary to use this space for cargo. As to the failure to utilize space forward, it was in evidence that the vessel already was out of trim and had this space been filled this condition would have been greater. According to the charter party the charterer had the right to ship cargo on the deck, and had he availed himself of this privilege, the vessel would have carried far greater tonnage and also have been able to trim properly. The claim for damages for short carrying is disallowed. (San Francisco Chamber of Commerce Arbitration, 1918.)

Damage to Vessel by Tug Having Her in Tow—Tug Not Liable Unless Carelessness or Neglect is Shown—A vessel being towed to sea from Honolulu was damaged by the tug, the cost of repairs being $923.50. The owner of the vessel made claim against the owner of the tug for reimbursement, claiming that the tug was at fault.

Held, That the whole operation of taking the vessel from along the wharf and out to sea was entirely in charge of the pilot and master of the vessel. That the Territorial pilot in charge of the vessel knew the size of the ship and the capacity of the tug having it in tow and the weather conditions, and was, therefore, in a position to know what steps were necessary in order to clear the vessel safely.

In our opinion, the tug cannot, in this case, be held liable unless it had been clearly proven that the tug had been careless or guilty of neglect and it was not so proven to the Arbitrators.

We decide that the damages claimed in this case, amounting to $923.50, are for the account of the owner of the vessel. (San Francisco Chamber of Commerce Arbitration, 1919.)

Dock Rental Chargeable to Vessel at San Francisco When All Cargo Space is Chartered but Vessel Operated by Owners—Custom of Port—A Pacific Coast merchant chartered "the whole of a vessel for a cargo of merchandise from Manila to San Francisco at the rate of $50 per long ton on 8000 long tons dead weight."

The charter party contained the following clause: *Cargo to be received and delivered at the vessel's tackles at port of loading and discharge.*

Under this clause, the Owner claimed that the Shipper should pay the dock rental, which is the charge made by the State Board of Harbor Commissioners at the Port of San Francisco for space on the dock at which the vessel discharged its cargo. The Shipper contended that cargo is not taken from the sling before it is deposited upon the dock and that under the custom at the Port of San Francisco dock rental is a charge against the vessel and not against the cargo.

Held, That under the custom, delivery at ship's tackles means delivery on the dock at a point within reach of ship's tackles. Furthermore, that it is the rule of the Harbor Commission at this port to impose the charge for dock rental against the vessel and that such is the custom of the port at San Francisco, although at other ports on the Pacific Coast, such charge is made against the cargo.

Shipper in this instance chartered cargo space and did not operate the vessel, as the charter was not a time charter.

It is not within the province of this Committee to decide whether this method of charging dock rental against the vessel is a desirable one or not for this port, but such being the established rule of the Harbor Commission, and it having been in force for some time past, we find in favor of the Shipper and we decide that the dock rental in question is a charge against the vessel and shall be paid by agent for the vessel's owners. (San Francisco Chamber of Commerce Arbitration, 1918.)

Shipper Responsible for Transshipment Charges on Steel Rails—Charge Must be Actual—An American exporter of **Steel Rails**, under a contract of affreightment with a carrier, agreed that *transshipment charges, if any, shall be for account of shipper.* The Rails were transshipped at Yokohama to Kobe, and the carrier made claim for $1498, which is claimed was the expense incurred in transshipment.

Held, That under the terms of the agreement the shipper was obliged to pay transshipment charges, as claimed by carrier. (San Francisco Chamber of Commerce Arbitration, 1921.)

The Shipper appealed from the award, alleging error on the part of the arbitrators. The arbitrators on appeal sustained the finding that the Shipper was obligated for the extra expense, but reduced the amount awarded. The arbitrators on appeal said:

"We agree with the Arbitration Committee that Shipper, through his Seattle representative, having agreed that *Transshipment charges, if any, are for the account of shipper,* such charges should be paid by shipper in this case, but we find that such charges must be the actual cost of the items entering into the transshipment and without profit to carrier or its vessel, which carried the goods to Kobe.

"We find no evidence to disprove carrier's claim that there was a serious congestion at Yokohama at the time the 'Uralsan Maru' arrived there which prevented the goods being transhipped to Kobe on the same vessel and which necessitated assorting and storage charges.

"Carrier in its reply to the appeal, states that the Y 3.50 per ton freight was only the charge for reloading at Yokohama and unloading at Kobe, which would not include freight transportation from Yokohama to Kobe." (San Francisco Chamber of Commerce Arbitration on Appeal, 1921).

Term "Free Berth" Interpreted to Mean Berth Free of Obstruction and Ready to Receive Vessel—Does Not Mean Free of Expenses—A contract was made between a shipper and the owners of a steamship for the transportation of a cargo of **Flour** from South Vallejo, California, to Charleston, South Carolina, and New York City, the contract containing this clause: *"Also that consignee will provide suitable free berth, without delay, at Charleston and New York and will take delivery at ship's tackle as fast as ship can discharge."*

The owners of the vessel claimed that the term *free berth* meant that the consignee should furnish a berth free of all expense to the ship, while the consignee claimed that it meant only that he should furnish an open berth free of obstructions, which would be ready for

the vessel to dock at immediately upon arrival, and that it is the custom of the ports both at San Francisco and New York for the ship to pay dockage charges.

Held, That the term *suitable free berth* means a berth free of obstructions and ready to receive the vessel upon its arrival without delay, which interpretation of the term *free berth* is well known and recognized by shipping interests. The vessel shall pay dockage charges. (San Francisco Chamber of Commerce Arbitration, 1916).

When Consented to by His Agent, Shipper Cannot Sustain Claim for Damages Due to Improper Stowage of Tar—Vessel Responsible for Pilferage, Short Delivery of Cases, Packages or Pieces—A San Francisco merchant chartered a steamer to a Pacific Coast merchant to carry 6,000 tons deadweight cargo from Marseilles, Genoa, Gottenberg and Antwerp for discharge at three Pacific Coast ports, namely San Diego, San Pedro or within the Golden Gate at San Francisco or Portland, or at a port in Puget Sound. The vessel's agent then engaged to solicit 3,000 tons of freight in Europe and handle same on joint account.

When the vessel arrived at San Francisco the charterer claimed that the sum of $4,751.77 freight money had been wrongfully withheld by the agent on account of short delivery and/or pilferage and/or breakage and/or damage to cargo and certain sums for commissions claimed. The charterer claimed that he was specifically exempted under bills of lading for pilferage and/or breakage and/or damage to cargo. At Gottenberg a quantity of tar was taken aboard and stowed in the poop, and certain damage to the tar and other cargo resulted.

As to the damage to the tar, the shipper maintained that it was caused by improper stowage and that the poop was not a proper place to stow it. On this point the arbitrators said:

"We find that the tar was stowed in the poop with the consent, implied or otherwise, of the shipper's agents, as appears by the following clause in a letter dated at Gottenburg January 2, 1912.

As regards the tar we beg to say that the only place where same could be loaded was the poop, but in order not to damage the stores we have been compelled to plaster all over the bulkheads, and we will send you an account for the costs.

"It will be noted that the agents apparently had full knowledge of the storage in the poop and further than that they paid the costs of plastering over the bulkheads. There can be no doubt in the minds of the arbitrators that they had full knowledge of the stowage in the

poop and in order to pay the costs of the plastering must have consented to same. For the above reasons we find that the ship is not liable for damage to the tar."

There were in addition ten specific claims for damage to miscellaneous cargo which the arbitrators decided in principle without going into the question of actual money settlements, the arbitrators stating on this point:

"Settlement of all claims should be made on the basis of actual cost of goods, plus freight and insurance. The arbitrators have not gone into the matter of the amount of each claim in dollars and cents, for the reason that they have been requested to decide only on the principle and that the parties would arrive at the amount of each claim and settlement of same between themselves."

Upon the question of claims for pilferage, breakage and short delivery the arbitrators

Held, That vessel is responsible for all pilferage; that vessel is liable for all breakage claims, except for broken bottles and contents of same. As regards the marble, the same having been improperly stowed, vessel is responsible for breakage, that vessel is responsible for short delivery of actual cases, packages or pieces. (San Francisco Chamber of Commerce Arbitration, 1912).

Award As to Tar Modified on Appeal—The question of damage to the tar was appealed to the Appeals Committee of the San Francisco Chamber of Commerce, and the award of the original arbitrators was modified to the extent that the shipper and the time charterer should each pay one-half the actual cost of reconditioning the barrels, and one-half of any other known loss through stowage of the tar. The arbitrators on appeal said:

"The shipper is the holder of the bill of lading. Therefore, no innocent party is injured by the omission on the part of the captain of writing an annotation in the bill of lading relieving him of his liability for claims on the tar. It is evident that the time charterer and the shippers knew that the tar would be stowed in the poop and both knew the risk attached and elected to take that risk in preference to the risk of having to assume the cost of forwarding by another vessel and/or claim for dead freight. For this reason we decide that the time charterer shall pay the shipper one-half the actual cost of reconditioning the barrels, and one-half of any other known loss through wrongful stowage of the tar." (San Francisco Chamber of Commerce Arbitration on Appeal, 1912).

Vessel Liable for Short Delivery of Nitrate of Soda—Percentage of Shortage—A Pacific Coast importer shipped a cargo of **Nitrate of Soda** from Iquique to San Francisco and San Pedro at $17.50 per long ton. The bill of lading called for 15,841 bags, but was indorsed to show that 25 bags were lost overboard in loading, leaving 15,816 bags shipped.

The shipper claimed a shortage of 157 bags at the average gross weight of 203 lbs. per bag, and demanded payment therefor. The vessel owner rejected the claim and asserted that the vessel delivered all of the Nitrate actually shipped.

Held, That the vessel is required to deliver, according to bills of lading, 15,816 bags at an average landed weight per bag of 203 lbs., allowing for a shrinkage of two pounds per bag, according to Shipper's letter of December 9, 1920. The total bags shipped (15,816) at an average weight of 203 lbs. per bag would be 3,210,648 lbs.

The landed weight of the nitrate, as shown by Shipper's letter of December 8, 1920, was 3,205,160 lbs., which would be a shortage of 5,488 lbs. or 2.45 tons of 2,240 lbs.

5,488 lbs. at $3.55 per 100 lbs.	$194.82
Less freight at $17.50 per 2,240 lbs.	42.88
Leaving amount to be paid by vessel	$151.94

We decide that Owner shall pay to Shipper the sum of $151.94 for short delivery of bags of nitrate shipped per S. S. "Sierra." (San Francisco Chamber of Commerce Arbitration, 1920).

Carrier Responsible for Extra Freight Charges When Cargo Under Contract is Shut Out—Effect of Over-Engaging Vessel—A, a Pacific Coast shipper, made a contract of affreightment with B, another Pacific Coast shipper, for a given tonnage of **Copra** to be shipped in a named vessel. B made a contract of affreightment with A for a given tonnage of **Sugar** to be shipped in another vessel. A fulfilled his contract with B as to the copra contract. The contract on the sugar called for the shipment of 1,875 tons per the "Bayard," from Manila. The carrier shut out 280 tons of the sugar at loading port on account of lack of space. A thereupon made claim against B for $1,530, representing the difference between the rate in the affreightment contract, and the rate charged in shipping per another carrier, and also made claim for $1,568, alleging damage to that amount for the difference between the sale price of the original lot of 1,875 tons and the prevailing price at the time the 280 tons shut out by original carrier reached the Pacific Coast per the second carrier.

Held, That as regards the item of $1,530 for difference in freight, it is in evidence that B over-engaged the "Bayard." Under the terms of the freighting agreement for space on the "Bayard," if the shippers had not furnished the full amount of 1,875 tons of sugar, and the space had been reserved for that quantity by the vessel, shippers wouldh ave had to pay dead freight for non-shipment of the portion not furnished and for which space had been engaged. Therefore, the shippers, having furnished the full amount and B being unable to receive it, the shippers were thereby damaged and the burden of making this damage good is upon B.

"The allusion of B to the fact that when A's agents were asked which he preferred to ship on the "Bayard," copra or sugar, in consequence of the lack of space, does not, in our minds, affect the fact that B through over-engagement of freight, was short on his contract of space to A. A's agents were not obliged to declare which cargo should be shut out, nor could he instruct as to this, but having been asked, gave as his preference that sugar be shut out. This does not alter the situation under the terms of the contract of August 7th.

"We decide that A is entitled to the sum of $1,530, difference in freight as claimed and that B shall pay this as full settlement of this claim.

"As regards the third item claimed, $1,568.00 for difference between the sale price of the 280 tons sugar and the selling price on November 2, 1917, we disallow this claim as being consequential damages which do not enter into this and the agent chose to shut out the sugar." (San Francisco Chamber of Commerce Arbitration, 1918).

Shipping Instructions, When Part of Confirmation, Control Shipment of Barley—Damages for Non-Compliance—A sold to B 750 tons of **Barley** delivered on railroad track Los Angeles. In confirming the purchase, under date of July 30, 1913, Buyer added the following clause: *Unless otherwise specified ship this barley to us at Los Angeles via Port San Luis and San Pedro.* On August 9th, in response to a request from Buyer for a confirmation of sale, Seller telegraphed Buyer as follows:

> *We confirm sale to you through broker 750 tons quality equal sample 09. August shipment. We hold your confirmation these purchases. Thought this was sufficient.*

On August 19th, Buyer telegraphed Seller:

> *Do not fail to ship Santa Maria lots via rail and water as per our formal advices. Arrange with steamship company and notify us before arrival. Have to divert.*

Seller refused to ship the barley by water on the ground that he was not obligated to do so, and shipped by rail to Los Angeles. Buyer accepted and paid for the barley on arrival, but claimed that as he had resold it at a point other than Los Angeles, namely Compton, and if it had been shipped by water as ordered by Buyer, he would have effected a saving of 50 cents per ton, on 400 tons resold to Compton, which he demanded as damages.

Held, That the acceptance by Seller of Buyer's confirmation included an acceptance of all the terms set forth in said confirmation, and therefore Seller was obligated to ship the barley to Los Angeles, via Port San Luis and San Pedro, unless otherwise specified. Accordingly Buyer's claim for 50 cents a ton on 400 tons received by rail and subsequently shipped to Compton at an additional freight paid by Buyer is allowed. (San Francisco Chamber of Commerce Arbitration, 1913).

Seller Not Entitled to Interest on Deferred Delivery of Barley, Due to Buyer's Objection to Quality—A sold to B 2,500 tons Standard Choice Brewing **Barley,** F. O. B. vessel Port Costa, California. The contracts contained this clause: *Storage after December 31st, fifteen cents per ton per month.* It was also specified that Chamber of Commerce certificates of weight and quality were to be furnished.

Buyer did not send a steamer to take delivery of this Barley until January 5th, at which date the "Achlibster" arrived at the dock. This steamer took delivery of about 1,200 tons when Buyer raised objections to the quality, and the steamer knocked off.

Pending the arbitration, Buyer removed the "Achlibster" and substituted the "Picton" to take the balance of the delivery, and wrote Seller on January 7th accordingly advising that the "Picton" would be at the warehouse on or about January 12th, to which Seller agreed. Seller claimed that he was, on January 12th, and at all times subsequent thereto, ready to deliver this barley, but heard nothing further of the matter until January 15th, when Buyer advised that the "Picton" would be at the dock on January 21st to take delivery of the balance of the shipment. In reply to same Seller immediately advised that under date of January 16th that he had a berth for this steamer arranged, but would be obliged to charge interest on the amount involved from that date until time of delivery and that in accordance with contract there would also be a charge of 15c per ton for storage.

In his submission to arbitration, Seller said:

"Had Buyer taken delivery of the barley as per contract on the 'Achlibster' which he should have done, this contract would have been completed on January 8th and the matter closed, but owing to his unwarranted objections to the certificates being issued and the consequent stoppage of delivery, the contract was not completed until January 26th, so that in reality we are entitled to interest on the undelivered portion between these dates but this we have not claimed. As regards storage, there can be no question as the contracts clearly state *storage after December 31st 15c per ton per month.*"

It was in evidence that no warehouse receipt had been tendered, and the Buyer claimed that no interest or storage could be charged until tendered and that no tender had been made until the barley was aboard ship.

Held, That Seller is entitled to the charge as made for storage on about 1,200 tons of Barley at 15c per ton. That Seller is not entitled to anything for interest as per charge made by him from the 12th to the 26th of January. (San Francisco Chamber of Commerce Arbitration, 1915).

Steel Bars

Buyer Not Justified in Reselling To Establish Loss for Variation in Delivery Short Length Steel Bars Without Notice to Seller — Custom of Trade — Non-Fulfillment of Contract Specifications — An American exporter sold to a merchant in Japan certain quantities of Mild **Steel Bars** of various sizes from 3/8 inch to 5/8 inch, specifying in bundles 12 feet in length. When the bars were received in Yokohama, Buyer claimed that they were not all in 12 foot lengths but that a large quantity were in 13 foot to 16 foot lengths and a certain quantity were 9 feet to 10 feet in length, and that as these were not desirable in that market he had been obliged to sell them at prices which resulted in a loss. Buyer made claim on Seller for his loss on sale of said bars, amounting to a total of Yen 13,480.79, this amount being the difference between the prices at which the Buyer had originally contracted to sell the bars to his purchaser, and the prices obtained by him on the resale of the bars in different lots at different times. Seller rejected the claim on the grounds that this act was not justifiable and arbitrary. Seller claimed that if Buyer had cabled him on arrival of the goods that he could not use those portions not 12 feet in length, Seller could have turned those bars over to other firms in Yokohama or Tokyo, who would have taken them at even higher figures.

After having made an independent investigation of the market for Mild Steel Bars in Japan, the trade custom in regard to shipping specifies lengths of these bars when so ordered by Buyer in Japan, and also making inquiry as to the proportionate value of bars of different lengths and also in short pieces, the arbitrators

Held, That Seller did not fulfill the conditions of the contract and make a good delivery of the merchandise in question. We find upon independent investigation, among many prominent exporters and manufacturers of Mild Steel Bars for the Japanese market, that when they receive orders from Japan for these bars in sizes 3/8 inch, 1/2 inch, 5/8 inch in 12 foot lengths, which is customary in Japan, they consider themselves obligated to furnish *only 12 foot lengths,* except that a variation of from 3/8 inch to 3/4 inch in cutting is considered permissible.

We, therefore, find that Buyer, not having received shipment in full as ordered, is entitled to such actual damages as he may have sustained from the wrong delivery of a portion thereof.

We cannot agree, however, if Buyer, instead of notifying Seller that goods were not in accordance with contract and asking for disposition of same and thus giving Seller the alternative of taking the bars off Buyer's hands, proceeded to sell the bars at reduced prices, that the difference in prices at which they were sold and the prices at which Buyer originally contracted to sell them, constitute the measure of damages. We decide that the real measure of damages is the actual difference in the value of the bars delivered and the bars ordered. We find that the greater portion of the bars over 12 feet in length could have been used by cutting them down to 12 foot lengths and applying these 12 foot lengths on Buyer's contracts, and that Buyer's actual loss would then have been as follows:

(a) Cost of cutting excess lengths to 12 feet lengths and repacking same.
(b) Difference in value of the short cut off pieces as compared with their equal weight in 12 foot lengths.
(c) The value of the 9 and 10 foot lengths as compared to 12 foot lengths.

We fix said loss as follows:

(a) There were approximately 377,610 lbs. of Bars over 12 feet in length. By reducing these Bars to 12 feet in length, a loss in weight amounting to 72,051 lbs. would have occurred, but the remaining 305,559 lbs. of Bars would then have met the exact specifications and could have been applied on Buyer's contracts. We find that the cost of cutting off and repacking these Bars in 12 foot lengths would amount approximately to .... $ 337.20

(b) We find that the value of the short cut off pieces, per ton, obtained by the above process, would be 20 per cent of the original invoiced value and, therefore, there was a loss of 80 per cent of the invoiced value of these short pieces, the weight of the short pieces amounting to 72,051 lbs. The loss on this item would be 4,107.04

(c) In view of the evidence submitted, we allow Buyer the difference between the resale price of the 9 and 10 foot lengths, Yen 5668.96 or $2,834.48, and the invoice price of these Bars, $3,365.85 as his loss net on these goods, which is 531.37

Total $4,975.61

We decide that Buyer is entitled to a refund from Seller of $4,975.61 and that Seller shall pay to Buyer that sum as full settlement for non-fulfillment of the contracts and all claims in this case.

We do not allow Buyer any profit on the cut off pieces or on the 9 and 10 foot lengths as we consider Buyer should have given Seller notice by cable, before selling the bars, that the goods were not in accordance with contract and asked for disposition of same, and thus have given Seller an alternative for disposal of the goods. (San Francisco Chamber of Commerce Arbitration, 1920.)

Award Modified on Appeal—The Seller appealed from the foregoing award, the arbitrators on appeal saying:

First—We confirm the decision of the Arbitration Committee that Seller did not fulfill the conditions of the contract and make a good delivery in full.

Second—We agree with the principle applied by the Committee in arriving at a basis for determining damages.

Third—We confirm the allowance awarded by the Committee in item (a) of $337.20, as estimated cost of reducing over-length Bars to 12 foot lengths.

Fourth—We confirm the allowance awarded by the Committee, in item (c) of $531.37 for difference in value of 9 and 10 foot length Bars.

Fifth—We do not agree with the award of the Committee in item (b) of $4,107.04, as Buyer's loss on the short pieces, if cut off the over-length bars, as it is clear from the records that the Committee estimated the value of these pieces simply as scrap, while we find from our investigations that they have a greater value in Japan than scrap value. We have exhaustively gone into the use and value in Japan of such short pieces of Mild Steel Bars, or "Crops" as they are designated, and find that there are a variety of uses to which they are put there, and that such "Crops" were being imported into Japan in considerable quantities in 1917 at higher prices than that fixed in the Arbitration Committee's award.

We, therefore, reverse the award of the Arbitration Committee for item (b) and from inspection by us of invoice of steel companies of shipments of "Crops" to Japan in the summer of 1917, we fix the fair value of the short pieces in question at sixty per cent of the invoice value of 12 foot Bars and we decide that Seller shall allow Buyer the difference between that value and the invoice value of the 72,051 lbs. of short pieces in question, amounting to $2,053.52.

Summing up, we decide that Seller shall allow Buyer as follows:

(a)	Estimated cost of reducing Bars to 12 feet	$ 337.20
(b)	Estimated loss of 40 per cent on invoice price of weight of short pieces	$2,053.52
(c)	Loss on sale of 9 and 10 foot bars	531.37
	Total allowance awarded Buyer	$2,922.09

And we decide that said allowances, when made, shall constitute full settlement of this case. (San Francisco Chamber of Commerce Arbitration, 1920.)

Tank Cars

Failure to Have Buyer's Tank Cars Ready for Vegetable Oil—30 Days' Notice of Vessel's Arrival—Advice to Broker—In April, 1919, a Pacific Coast importer sold an Eastern Manufacturer about 100 long tons of Chinese **Peanut Oil,** duty paid, F. O. B. Buyer's tank cars, Seattle, Wash., Transcontinental Freight Bureau weights to govern as to quantity delivered to cars. Shipment was to be by steamer from the Orient during April–May, 1919.

Seller was to give Buyer about 30 days' notice prior to anticipated arrival of the shipment at Seattle, and Buyer was to have tank cars in sufficient capacity to hold the full amount of oil covered by the contract, and any expense accruing by reason of Buyer's delay in furnishing tank cars was to be for Buyer's account. April 29, 1919, Seller advised a Chicago broker, who negotiated the sale, that the vessel on which the oil was shipped was due at Seattle June 2nd, and directing the broker to arrange to have tank cars at that port in time to discharge this cargo. The broker so notified the Buyer on May 3rd. The vessel did arrive at Seattle June 2nd, as scheduled, and the Oil was transferred to a lighter on June 4th, the mate's receipt bearing the following notation:

> "Four (4) barrels empty from ship, fifteen (15) leakers dumped into other barrels. Oil in leaky condition from ship."

The oil arrived at Drummond Lighterage Company's plant June 4th for loading into tank cars, which were not available for loading, although Buyer advised that the tanks were en route. Tank cars not having arrived, the oil was kept on the lighter pending their arrival. The record thereafter shows: That on June 9th two tank cars were assigned and oil was landed on dock and weighed June 10th.

That Drummond Lighterage Company ordered these two cars on June 9th to be spotted at their plant and one was so spotted on June 10th and the other not until June 17th and one car had to be cleaned causing a loss of one day in loading.

That the third car was not assigned until June 12th and was spotted on June 13th and loaded June 14th.

That Seller claimed as charges accruing through Buyer not furnishing tank cars on June 5th, when oil was at dock ready to load into cars, the sum of $924.41, which should be $829.62, on account of error in calculating interest, which is admitted by Seller.

That besides cost of interest, insurance and telegrams, Seller claimed an allowance of $655.52 for loss on 4162 lbs. of oil lost, due to Buyer's delay in furnishing cars, this amount being the difference between weigher's net weights on dock and tank car weights when loaded into cars.

That Buyer denies any liability and asks to be reimbursed for the entire amount of $924.41, which Buyer had paid under protest pending adjustment of the claim, with interest at 6 per cent from July 7, 1919.

Held, First—That Seller's claim as to error in weigher's Mark Gross is correct, as we find that only Mark Gross for the original 28 barrels on Sheet No. 8 is included in the total Mark Gross by weigher and 5136 lbs. Mark Gross of empty 12 barrels originally shipped from Orient as shown on weigher's Sheet No. 9 should be added, which would make total Mark Gross, according to weigher's summary, to be 263,422 lbs. With this correction the difference between weigher's weights and the Shanghai weights is slight, being only 7 lbs. on net weights, and we accept weigher's weights as official.

Second—That proper notice of "about 30 days" was given by Seller to Buyer of the expected time of arrival of vessel as Buyer's Broker was notified by wire on April 29th and he notified Buyer by letter on May 3rd. Therefore, even if Buyer did not receive this letter until May 4th that would have been 29 days' notice, and from his letter to his Seattle representative, dated May 2nd, advising him of the expected arrival of the Oil, it is possible Buyer received verbal or other notice prior even to May 2nd.

Third—That Buyer was in default in not furnishing and tendering tank cars for the oil in question by June 5th when the oil was ready for discharge at Drummond Plant, and we decide that the date of notice to Drummond Lighterage Co. of assignment of designated cars is the time of delivery of said cars by Buyer, but that time lost in cleaning any cars, after being spotted at the plant, shall be for Buyer's account.

Fourth—We disallow Seller's supplementary cliam for any estimated loss of oil while on lighter from June 5th to June 10th in view of the fact that many barrels were in bad condition when discharged from steamer, and Seller should have landed, recoopered and weighed the barrels on June 5th in order to minimize damages.

Fifth—We find that Seller is entitled to a reasonable amount for oil actually lost between the time it was landed on dock and weighed and the time final tank cars were assigned, due to the delay by Buyer in furnishing cars, which amount we fix as follows:

Net weight when weighed on dock, no allowance having been made for soakage in transit	210,582 lbs.
Net weight when loaded into cars	206,420 lbs.
Difference	4,162 lbs.

From which we allow following deductions:

(a)	Soakage in transit, for which we allow 4 lbs. per barrel on 598 bbls	2392 lbs.	
(b)	Net weight of 2 barrels not loaded	726 lbs.	
(c)	Loss in dumping Oil, for which we allow ⅛ of 1 per cent on 210,582—726 = 209,856 lbs.	263 lbs.	
	Total deductions		3,381 lbs.
	Amount of Oil lost		781 lbs.

We decide that Seller is entitled to an allowance by Buyer for loss of 781 lbs. of Oil, through Buyer's delay in furnishing cars on time, at 15¾ cents per lb. $123.01

Sixth—We allow Seller $37.94 interest for 7 days from June 5th to June 12th, the date of tender of third car, as Seller was entitled to invoice the entire shipment at same time, but we disallow interest from June 12th to June 17th as we find that time of spotting cars and loading is for Seller's account and any delay in spotting cars, after being ordered by Drummond Lighterage Co., is a matter between Seller and Railroad Company.

Seventh—We allow Seller fire insurance as claimed on Oil while at Drummond Plant $21.52

Eighth—We disallow Seller's claim for $68.00 marine insurance on Oil while on lighter as original insurance from Shanghai covered the Oil *until landed at Seattle* and this second policy was duplicate insurance and unnecessary.

Ninth—We disallow Seller's claim for salary and expenses of an employee while at Seattle as he was in Seller's regular employ and his presence in Seattle was optional with Seller, who had engaged Drummond Lighterage Co. to handle the Oil from steamer to tank cars.

Tenth—We disallow Seller's claim for expense of telegrams and telephone messages as we consider these were for the mutual interest of both parties.

Summing up the above findings we make the following award on Seller's claims:

We award to Seller

(a)	Loss on 781 lbs. Oil at .15¾c per lb.	$123.01
(b)	Interest as claimed for 7 days	37.94
(c)	Fire insurance as claimed	21.52
	Total award to Seller	$182.47

We disallow seller's claims for

(a)	Marine Insurance	$68.00
(b)	Representative's salary and expenses	54.60
(c)	Telegraph and telephone messages	19.56
	Total	$142.16

And we decide that out of the $924.41 paid by Buyer to Seller under protest for Seller's claim as originally made, and before errors therein were corrected, Seller shall refund to Buyer the difference between said $924.41 and $182.47 awarded Seller, amounting to $741.94, with interest thereon at 6 per cent from July 7, 1919, the date Seller's draft was paid, to date refund is made, and that such payment, when made, shall constitute full settlement of all claims in this case. (San Francisco Chamber of Commerce Arbitration, 1921.)

Affirmed on Appeal—The Seller appealed the foregoing, alleging error on the part of the original arbitrators. The Appeals Committee sustained the original award without comment. (San Francisco Chamber of Commerce Arbitration, 1921.)

Tender

Must Act Upon Tender Within 48 Hours—The general rule is that a tender, or delivery of sample to Buyer's agent at point of tender, on sales between parties located in the United States and/or Canada, if made between 9 a. m. and 5 p. m., and between 9 a. m. and 12 noon Saturdays (Sundays and holidays excepted) shall constitute delivery unless rejected within 48 hours from tender or delivery to Buyer's agent. (Foreign Commerce Association Rule No. 33).

Upon acceptance of rejection it is the rule that Seller shall have the right of other tenders provided same are made within contract time.

When a rejection of Vegetable Oil is left uncontested by the Seller or is sustained as a result of arbitration, Seller shall have the original contract period within which to tender other lots. (Foreign Commerce Association Rule 272).

Failure to reject a tender of Vegetable Oil within 48 hours after sampling (Saturdays, Sundays and holidays excepted), shall constitute an acceptance of tender by Buyer, except that when tenders are made at points where no licensed inspector and chemist of the Foreign Commerce Association, New York Produce Exchange or Interstate Cottonseed Crusher's Association (according to the contract used) are located, Buyer cannot be held to the foregoing time allowance, but must be given an opportunity to verify quality by promptest available other means. (Foreign Commerce Association Rule No. 276).

A contract covering **Vegetable Oil,** June shipment from Pacific Coast, delivery of two tanks subsequent to June was held valid, time of *shipment* and not time of *tender* being the essence of the contract. (Foreign Commerce Association Arbitration No. 23, 1920, Page 194).

Seller, having defaulted in making *immediate* shipment of **Beans,** he was held to have forfeited the right of a second tender after the expiration of the *immediate* shipping period. (California Bean Dealers Association Arbitration No. 19, 1918, Page 33).

The tender of a sampling permit allowing the drawing of a five pound sample of **Manchurian Walnuts** in bonded warehouse from 1,000 bags of Manchurian Walnuts was held not to be a valid tender under a contract specifying duty paid ex dock San Francisco, and Buyer's rejection was sustained. (Foreign Commerce Association Arbitration No. 44, 1922, Page 243).

A Buyer who rejects a tender of Manchurian **Walnuts** on the ground that they do not comply with contract specifications cannot insist upon another tender under a contract containing a clause that "Rejection constitutes delivery" (Rule 15 of the Foreign Commerce Association) and Seller is relieved from all obligation of fulfilling contract. (Foreign Commerce Association Arbitration No. 35, 1921, and No. 35-A, 1921, Page 156. See also Dissenting Opinion, Page 158).

A second tender, as permitted under Rule 15 of the Foreign Commerce Association, must be noticed by the Seller to the Buyer if Seller is to preserve his rights of retender, it being held that Rule 15, permitting retenders during the life of a contract, allows an option entirely in Seller's favor and to Buyer's detriment. A delay of eleven days was held to be unreasonable and to have deprived the Seller of his right to retender. (Foreign Commerce Association Arbitration No. 44, 1922, Page 243).

Under a sale and purchase of "spot" goods, Buyer cannot sustain a rejection of **Beans** on the ground of undue delay without first having demanded a tender. (San Francisco Chamber of Commerce Arbitration, 1919, Page 252).

When Buyer stipulates that tender of **Peanut Oil** shall be made to a designated agent, rejection of shipment made without such tender to the agent was sustained. (Foreign Commerce Association Arbitration No. 23, 1920, Page 250).

Where a contract covering **Kotenashi Beans** contains the clause *Rejection made by Buyer and accepted by Seller constitutes delivery,* and where it is specifically stated that Seller is not bound by any agreement or understanding other than that embodied in the contract, rejection of beans that do not conform to contract, when accepted by Seller, precludes a new tender by Seller, and trade custom may not be set up under the limitation in the contract itself as to any agreement or understanding not embodied in the contract. (California Bean Dealers Association Arbitration No. 12, 1920, Page 250).

A tender of **Rice** made by mistake may be withdrawn, and such withdrawal is not an acceptance of rejection. (San Francisco Chamber of Commerce Arbitration, 1919, Page 247).

Where under an October delivery contract Buyer requests delay as to acceptance or rejection of **Prunes** until November and in November rejects outright, Seller has the right of a new tender. (Dried Fruit Association of California Arbitration, No. 25, 1917, Page 250).

When under a contract Seller is obligated to make a second tender of Manchurian **Walnuts,** it stands to reason that he must have the unexpired portion of the contract period in which to do so. And if, for cause, said second tender were rejected and the contract were still alive, Seller would still be bound to make even a third tender. (Private Arbitration at San Francisco, 1922, Page 245).

Sampling Permit on Bonded Warehouse Not a Valid Tender of Goods Sold Ex Dock, Duty Paid—Right of Second Tender—Seller's Option Must Be Elected Promptly and Formally to Keep it Alive—A San Francisco merchant sold to a merchant in the same city fifty tons of Manchurian **Walnuts,** bleached 1⅛ inch in diameter or larger, guaranteed to crack not less than 90 per cent sound sweet meats, October-November (1921) shipment from the Orient, ex Dock, San Francisco, duty paid, Buyer's inspection, certificate of Foreign Commerce Association to be final. Prior to arrival of the nuts, Seller declared the shipment per the S. S. "Azumasan Maru."

The goods were tendered to Buyer January 5, 1922, and rejected on the same day on account of the good crack falling below the guaranteed 90 per cent. On January 17th, Seller accepted Buyer's rejection of the first lot, and claiming the right to retender under Rule 15 of the Foreign Commerce Association of the Pacific Coast, Uniform Contract, presented to Buyer a sampling permit, allowing the Buyer to sample and inspect the walnuts in bond. The sampling permit called for five pounds of walnuts. The Buyer refused the sampling permit and contended that the Seller had no right to make a second tender, since it had been stated verbally by the Seller that if his supplier did not insist upon making a new tender, Seller would not do so. Buyer further contended that eleven days was an unreasonable delay in making or signifying Seller's intention to make a second tender. A further claim was made by Buyer that the Seller had not been required to accept a new tender from his supplier but on the contrary had received a cash settlement on account of breach of contract.

The record showed that when the first tender was made, Seller did not present certificate of the Foreign Commerce Association as to quality. Buyer rejected, and Seller in writing refused to allow the rejection, but Seller admitted in his brief that inspection by the Foreign Commerce Association showed the quality not to be in accordance with contract, and that he verbally withdrew his protest against the rejection.

The arbitrators, in their findings, said:

"Under Rule 15, in the event of rejection, accepted by Seller, the Seller has the privilege of replacing within the contract time. This being an option entirely in Seller's favor and to Buyer's detriment, Seller must promptly take the ordinary commercial steps to preserve his rights and it is to be presumed that if under this rule he intends to exercise his option, he is to give Buyer proper notice, otherwise Seller's option lapses. No such notice was given in this case unless we can consider that such notice was given in conversations between Seller and Buyer, to the effect that if Seller's supplier made another tender, then Seller would also retender to his Buyer.

"Seller's rights under Rule 15 are different from Seller's rights under a contract putting upon Seller a definite obligation to make another tender. Where the obligation is definitely upon Seller, then there is no need to give formal notice in advance of the retender. Where the retender is entirely at Seller's option, arbitrators feel that Seller, in order to avail himself of said option, must do so formally, and within a reasonable time and, accordingly, find that Seller did not keep alive his option of retendering.

"Further, Seller's so-called second tender is really not a tender at all. Under this contract, to make a tender, Seller must present Buyer with certificate of Foreign Commerce Association as to quality, together with delivery order on dock, calling for the delivery of walnuts on which duty has been paid. All that Seller tendered to Buyer was a sampling permit for five pounds (say 150 to 200 nuts), which, by the way, is an entirely inadequate sample to represent 1,000 bags.

"Had Seller definitely declared to Buyer his intention of making a second tender, promptly after the first tender was rejected, then he would have had under Rule 15 the entire life of the contract in which to make the second tender, i. e. the time within which the second tender could be made would run until the latest date at which goods would have arrived from the Orient if shipped within contract time.

"Buyer makes reference to having understood that he was purchasing a re-sale parcel and implies that he only dealt with this Seller because Seller satisfied Buyer that he had a purchase contract with a responsible supplier. This is not pertinent to the present case, as there is nothing in the contract between Buyer and Seller which shows that Buyer treated Seller in any other light than that of a principal. Any Buyer who wishes to have behind him the responsibility of a Seller's supplier can only do so by having Seller's supplier endorse in some way Seller's

obligation to Buyer. Arbitrators feel that it is to the interest of the trade to point the injustice worked against responsible firms when dealers are willing to accept unguaranteed contracts from those whom they and their brokers do not believe to be responsible."

Held, That the rejection of the second tender by Buyer is sustained on the ground that the Seller must elect his option of a new tender within a reasonable time, and also that the tender of a sampling permit calling for a five pound sample of goods in bond is not a valid tender of goods sold ex dock. (Foreign Commerce Association No. 44, 1922).

Right of Seller to Make Second Tender—Seller's Obligation to Make Delivery Under a Contract Not Containing So-Called "Rejection Constitutes Delivery" Clause—Reasonableness of Time of Retender—Life of Contract—A Pacific Coast importer sold to a San Francisco merchant between 600 and 700 bags of **Manchurian Walnuts**, crop of 1921, November-December (1921) shipment from the Orient. Seller delivered and Buyer accepted 107 bags under the contract. In the early part of January, 1922, the Seller tendered under the contract 600 bags of walnuts, which were rejected because of undersize and quality being below 90 per cent "good crack." Seller made no other tender until February 2, 1922, when he gave Buyer an inspection order calling for 500 bags of nuts. The Buyer objected to the tender on the ground that the nuts did not crack 90 per cent or better sound sweet meats; that 8½ per cent or more of the nuts were under the size specified in the contract, and Buyer advanced two additional grounds for rejection, as follows:

> The lot as a whole (apart from the undersized nuts and the poor quality of the meats) shows shells so rough and heavily indented and contains so heavy a percentage of stained shells, that it is impossible, without expensive hand picking, to make a satisfactory bleach of them, with the result that a considerable percentage of the lot is practically unmerchantable.
>
> The nuts tendered arrived in San Francisco on December 13, 1921. They were not tendered to the Buyer until February 1, 1922. They were shipped by a party other than the Seller and probably represent a lot rejected under some other contract. These nuts were bought under a contract calling for November-December shipment. If they had been imported by the Seller himself, it would not be contended that the Seller would have had the right to hold them without

> making a tender of them for fifty days after they had arrived, and it certainly cannot be claimed that he has any greater right to tender nuts imported by another person which have lain in San Francisco fifty days before the tender. While the other grounds already dealt with amply justify the rejection, it should be sustained on this ground as well.

Seller contended that, as to the quality and size, the walnuts should be tested by arbitrators. As to the shells being rough, he pointed out that he had sold "Manchurian Walnuts", and had delivered such walnuts, and that he was entitled to deliver walnuts as produced. Concerning his right to make a new tender, Seller stressed the following clause in the contract:

> When sale provides for a given time of shipment from abroad, unless based upon "payment in exchange for ocean documents", Seller has the option of filling contract with goods shipped earlier than contract period, provided time of delivery is approximately the same.

Seller also contended that he was obliged to make delivery of the walnuts, since his contract did not have a clause specifying "Rejection constitutes delivery", and since he was obligated to deliver, Buyer was bound to accept a valid tender. As to the time of tender, Seller pointed out that the contract specified November-December shipment from the Orient, and, therefore, he was entitled (and obligated) to make a retender at any time within the life of the contract, and that the life of the contract extended to the period when the last vessel leaving the Orient in December arrived at San Francisco, the port designated in the contract; that as the S. S. "Tobo Maru", with December ladings from the Orient, was due to arrive at San Francisco about February 22, 1922, he had up to that time to make other tenders, if for reasons of size or crack the walnuts before the arbitrators were rejectable.

After determining that the walnuts were a good delivery as to size and "good crack", the arbitrators

Held, As to general appearance of the walnuts: The contract specification does not call for "bleached" or "f. a. q.", nor is there any guarantee as to appearance, brightness of shell, etc., consequently the nuts are a good delivery in this respect.

As to time of tender: This being the second tender under the contract, made in accordance with Buyer's demand, the time elapsing between the rejection of the first tender and the tender of the second lot, does not appear to be unreasonable, particularly so since Buyer

did not at the time make any protest; Buyer's acceptance of Seller's inspection order on or about February 1, 1922, was tacitly an acquiescence in Seller's right to make a second tender at that date.

As to warranty that nuts would be imported by Seller: Buyer's remarks in this connection are not germain as the Seller not having specifically contracted to import this merchandise himself, naturally has the right to buy from others to fill.

As to lapse of time between arrival of "Siberia Maru" and tender of the nuts: When under a contract Seller is obligated to make a second tender, it stands to reason that he must have the unexpired portion of the contract period in which to do so, as he must purchase other goods that will make substantially the contract delivery. Walnuts in the shell do not deteriorate in warehouse at this season of the year. This particular lot was shipped from the Orient within the shipping time stipulated in the contract, and taking into consideration all of the circumstances, was tendered Buyer within a reasonable time. Arbitrators would have so found, even if these walnuts had been imported by Seller himself by the "Siberia Maru" and had been held by Seller here in the warehouse.

As to Buyer's claim for damages instead of a third tender. In view of the findings in this case, the question of damages raised by Buyer calls for no decision, but arbitrators desire to point out that as the contract under consideration did not contain the clause "Rejection Constitutes Delivery", in the event of rejection for just cause Seller is obligated to make another tender (such tender of course to be made during the life of the contract) and if for cause said second tender were rejected and the contract were still alive, Seller would still be bound to make even a third tender, and so on until either a good tender were made and accepted or the contract time for delivery expired, after which time Buyer's remedy would be a claim against Seller for damages. The claims of the Buyer are disallowed. (Private Arbitration at San Francisco, January, 1922).

Mistake in Tender May Be Corrected—Withdrawal of Tender Is Not Acceptance of Rejection—Effect of War on Shipping— A sold to B 2232 large bags Siam Usual **Rice,** May shipment from the Orient, cash against delivery order at Seattle. On July 24, 1918, Seller, having received advices from the railroad carrier at Seattle that the rice ex "Arabia Maru" was at its Seattle depot consigned to Seller, made tender to Buyer. Subsequently, Seller learned from the rail carrier that its notice was in error, and Seller withdrew his tender, offering, at the same time, to substitute a tender of rice on arrival of

S. S. "Chicago Maru," a May steamer from Hongkong. No vessel was named in the contract. The rice shipped per S. S. "Chicago Maru" was transhipped per the S. S. "Kenkon Maru," which proceeded to Tacoma, and discharged there instead of at Seattle. Freight to Seattle was for the account of Seller. Buyer rejected the tender ex S. S. "Chicago Maru."

In discussing the case, the arbitrators said:

"The Committee has taken into consideration the stress of circumstances during the war period by which transportation suffered during that period.

"The Committee wishes it distinctly understood that the decision in this particular case is not to be considered as establishing a precedent that goods destined for delivery at a designated port can in all cases be discharged by vessel at another port and delivery tendered there or the goods forwarded to the point of destination for delivery there.

"Had the goods in question constituted a full cargo or had this been a straight C. I. F. contract between Seller as shipper at Hongkong, and Buyer this case would be different.

"The goods in this case constituted only a parcel and the terms were shipment from Hongkong in May, cash against delivery order at Seattle, with no vessel designated and no limit specified for time of arrival at Seattle, and the goods were the property of Seller until delivery at Seattle and delivery accepted by Buyer. As Tacoma and Seattle are in close proximity, the Buyer in this case was not concerned how the goods reached Seattle so long as there was no unreasonable delay by Seller in transporting them, at his expense, from Tacoma to Seattle and delivering same there in good order in accordance with contract. Seller admits transportation charges from Tacoma to Seattle must be borne by him and that he must make delivery at Seattle only, if Buyer so insisted.

"The committee has considered the contention of Buyer that he suffered by having to buy other rice for shipment to South America per S. S. "Santa Alicia" on account of non-arrival before that vessel sailed of the rice shipped per S. S. "Arabia Maru" or S. S. "Chicago Maru," but in view of the fact that the S. S. "Santa Alicia" sailed from Seattle about July 16, 1918, and neither of the parcels shipped via above two vessels having arrived until after that date, and there being no time of arrival designated in the contract, which only provided for May shipment from Hongkong, we do not think his contention is good.

"We award to Seller as full settlement for his claim in this case the following items:

(1) Loss on the re-sale of 2,232 bags rice ex "Kenkon Maru" estimated........$2,025.85
(2) Interest on re-sale price of 1,232 bags at 6 per cent from August 7, 1918 to September 6, 1918.
(3) Interest on re-sale of 1,000 bags at 6 per cent from August 7, 1918 to October 15, 1918.
(4) Interest on $2,025.85, the loss on re-sale price of 2,232 bags from August 7, 1918 to November 7, 1918. (We fix 6 per cent as a reasonable rate of interest instead of 7 per cent claimed by Seller.)
(5) Storage on 250 tons at 25c per ton for one month......$62.50
(6) We disallow Seller's claim for $50 cost of telegrams and telephones.

Supplementary Award—The arbitrators, having learned after the award had been published that the rice had not actually been moved to Seattle from Tacoma, made a supplementary award, allowing Buyer a reduction in damages an amount equal to the cost of transporting the 2,232 bags of rice to Seattle from Tacoma. (San Francisco Chamber of Commerce Arbitration, 1919).

Affirmed on Appeal—The Buyer appealed the decision, the arbitrators on appeal affirming the award, as follows:

"We find that this case was a C. I. F. sale and the contract stipulates that "C. I. F. and C. F. sales differ from F. O. B. sales only in that Seller guarantees insurance and freight as the case may be; no additional responsibility being involved." That under such contract any damage by delay of vessel due to transhipment or actual damage if any to the goods shipped are for Buyer's account and not for Seller.

"As long as Seller tendered delivery at Seattle of rice of the prescribed quality that was shipped from Hongkong in May, 1918, he fulfilled his contract and Buyer was bound to take delivery regardless of whether the vessel sailed to Tacoma or Seattle, and the fact that the vessel discharged at Tacoma and the rice would have to be transported from there to Seattle before actual physical delivery could be made, does not affect the tender at Seattle, provided Seller bore the freight charges to Seattle.

"We do not find that the Arbitration Committee committed error in its decision of January 31, 1919, except that Buyer is entitled to an allowance of the cost to Seller of transporting said rice from Tacoma

to Seattle, which matter has been since corrected by the Arbitration Committee in its Supplemental Award dated February 21, 1919, which has been brought to the attention of the Committee on Appeals and said decision with that correction is hereby confirmed. (San Francisco Chamber of Commerce, 1919).

When Second Tender Permitted—A sold B a quantity of 20/30 **Prunes.** Although tender was made on October 27th, Buyer requested delay as to acceptance or rejection until November. Thereupon he rejected the entire shipment, Seller contesting and claiming that he had a right to make a new tender.

Held, That Seller had the right of a second tender. (Dried Fruit Association of California Arbitration No. 25, 1917).

Limitation in Contract as to Second Tender—A sold to B a given quantity of Japanese and/or Korean **Kotenashi Beans,** H. P. 1919 crop, not to exceed 2 per cent damage, 16 per cent moisture, Chamber of Commerce certificate to be final. The form of contract used by the parties expressly stated: *Rejection made by Buyers and accepted by Sellers constitutes delivery.* The contract further contained this clause: *It is expressly understood that Sellers are not bound by any agreement or understanding other than that embodied in the present contract.*

Seller tendered a lot of beans with San Francisco Chamber of Commerce certificate which showed an excess percentage in the moisture content. Buyer rejected. Seller accepted the rejection and then attempted to add a condition thereto, namely, his right to make a second tender under the contract, pleading a custom of the trade and claiming the application of Rule 15 of the Foreign Commerce Association. The contract was not the Uniform Contract of the Foreign Commerce Association of the Pacific Coast, and there was no reference therein to the rules of said Association.

Held, That there is an express limitation in the contract itself which precludes giving force and effect to any trade custom or rules of any recognized association, and the parties by so limiting themselves by written contract absolutely prevent the application of the custom long recognized and accepted by the trade, namely, other tenders, provided the same shall be made within the life of a contract. (California Bean Dealers Association Arbitration No. 12, 1920).

Tender Must Be to Designated Agent—Seller at Fault in Making Unauthorized Shipment—Sufficiency of Samples—A sold B a quantity of Oriental **Peanut Oil,** maximum 2 per cent free fatty acids, Seller's tanks. B rejected one tank car on the ground that the quality did not conform with contract.

The contract was dated June 9, 1920, and was the Uniform form adopted February 14, 1920, by the Foreign Commerce Association containing the usual "clause paramount." Seller contended that the contract having been predicated upon rules of the Foreign Commerce Association in force at time of contract, the rules dated as of May 20, 1920, should apply and that the rules adopted as of February 14, 1920, had been superseded thereby. Buyer contended that the rules of February 14, 1920, were in force and effect at the time the contract was entered into and therefore Rule 310 governed this contract.

The amended rules were not promulgated by the Foreign Commerce Association until July 13, 1920. It is true that early in May the trade generally had notice through trade publications that the New York Produce Exchange, the Interstate Cottonseed Crushers' Association and the Foreign Commerce Association had adopted rules governing trade in imported vegetable oils and that this fact was generally known to the trade. But in truth and in fact the Foreign Commerce Association had not officially published the rules until July 13, 1920 and therefore they could not have been in force and effect on the date of the contract in dispute, namely, June 9, 1920.

Held, That this contract must be construed under the rules adopted as of February 14, 1920. The description of the grade in the contract, i. e. "Oriental Peanut Oil—maximum 2 per cent free fatty acids," is substantially the grade as set forth in Rule 310, Oriental Peanut Oil, crude, guaranteed not over 2 per cent free fatty acids, which is rejectable if not up to contract grade. On the other hand, the language of the contract does not convey the idea that Seller intended to offer the grade covered by Rule 323 of the amended rules—"Peanut Oil, Fair Average Quality, Crude," which is not an oil with the guaranteed maximum of free fatty acids, but a non-rejectable grade, with allowance.

On the question of tendering and sampling the oil in dispute the arbitrators were of the opinion that a named forwarder at Seattle was the duly authorized agent of the Buyer and the contract specifically provided that the agent sample the oil deliverable under the contract. Furthermore, Seller acquiesced in that clause in that the first nine (9) cars shipped were loaded, passed and shipped under the supervision of the agent. Hence the arbitrators said that Seller could not argue that that clause in the contract had no binding force and that Seller was at fault in loading the car in question before the agent had an opportunity of inspecting the equipment, as provided under Rule 107. In the event of a dispute between parties as to samples for arbitration,

the parties should have afforded the Association the opportunity of drawing an independent sample, the arbitrators said. As soon as Seller received the report from his own chemist and notified Buyer of the difference between the Seller's chemist and the Buyer's chemist, Seller should have notified Buyer that an independent sample and analysis were desired for arbitration purposes. The arbitrators declared that Seller, by forwarding the car to destination and not having arranged for an independent sampling, technically lost his right of arbitration, since the analysis at Chicago could not be held to be an independent analysis and therefore was of no value to the arbitrators. The arbitrators said that it was true that the market was far more stable at the time the car was shipped than at the time it was resold, but Seller, having been in default by reason of his negligent act by permitting the car to go forward, was blameable and responsible for the differential between the market prevailing at the time of shipment and that certain time when the car was resold.

Held, That while the arbitrators are disinclined to allow a rejection on purely technical grounds, they are of the unanimous opinion that Seller did not properly protect his own on Buyer's interests, and Buyer was within his rights in rejecting the tender, that rejection therefore was sustained and Seller's claim disallowed. (Foreign Commerce Association Arbitration No. 23, 1920).

Under "Spot" Sale, Buyer Cannot Cancel Contract Without Having Demanded Tender—Meaning of Term—A sold to B a quantity of Japanese and/or Korean **Kotenashi Beans** in bond, ex warehouse Seattle, net reweights, cash against weight tag and delivery order. The contract contained this clause: "Shipment: *Goods spot Seattle.*"

The contract was made through a broker. The formal signed contract was returned by B to the broker, under date of August 9th, and was received by him August 11th. On that date the broker transmitted the contract to the Seller who received it August 12th. On August 22nd Seller notified Buyer he was ready to make delivery and asked whether Buyer was ready to accept same. Seller was notified to furnish required documents before invoice could be paid. An official tender of the documents was made by Seller on August 25th. Buyer, however, claimed that documents were defective and that among other things the warehouse receipt was not properly endorsed by a New York merchant which was required and returned the documents.

On August 26th, Buyer claimed he noted the contract was for *spot* delivery Seattle, and that, as 22 days had elapsed since the purchase,

he notified Seller he was cancelling the contract on account of non-performance. On September 4th, Seller again tendered documents, with warehouse receipt endorsed by a New York merchant, and other documents amended, with invoice, which were refused.

Held, That 22 days had not elapsed on August 25th, as Seller did not receive the contract which was signed by Buyer on August 9th, until August 12th, and furthermore, no evidence was submitted that Buyer had during that time made any demand for delivery. It is in evidence that the goods were on hand in Seattle at the time the sale was made August 4, 1919, being stored and inspected at East Waterway Dock August 2, 1919, and stored in East Waterway Dock & Warehouse Co.'s No. 3 Warehouse, August 12, 1919.

We further find that a contract for sale of *spot* goods, when no time for delivery is specified in contract, cannot be cancelled by Buyer, if Seller has not tendered delivery, until request for delivery has been made by Buyer and Seller fails to make same within usual time, nor can Seller cancel until he has made proper tender and same has been refused by Buyer.

As the contract provided no specific date for delivery, and Buyer in this case made no demand for delivery before cancelling, we decide that the contract is in force and Buyer must take delivery of the beans, as he must, within a reasonable time, demand delivery before cancelling for non-performance. (San Francisco Chamber of Commerce Arbitration, 1919.)

Award Affirmed on Appeal—The Buyer appealed from the foregoing award, the arbitrators on appeal saying:

"We fully agree with the Arbitration Committee that a contract for sale of *spot* goods, when no time for delivery is specified in contract, cannot be cancelled by Buyer if Seller has not tendered delivery, until request for delivery has been made by Buyer and Seller fails to make same within usual time, nor can Seller cancel until he has made proper tender and same has been refused by Buyer. In the case in question the provision in the contract *Shipment: Goods spot Seattle*, without either of the terms *immediate shipment* or *prompt shipment* being designated therein, and without any time for delivery being specified, simply means that the goods were on *hand* at Seattle at the time the sale was made and subject to immediate tender by Seller on demand by Buyer. Award affirmed." (San Francisco Chamber of Commerce Arbitration, 1919.)

Tender of Delivery Order and Warehouse Receipts Does Not Comply with F. O. B. Cars Contract—Delivery on March 1st Does Not Fulfill January-February Shipment—A San Francisco merchant sold 7,500 pockets of California Japan **Rice** to a mill in the same city, January-February shipment, F. O. B. cars San Francisco. Under the contract 5,500 pockets were delivered in accordance with contract before the expiration of the contract period, leaving 2,000 pockets to be delivered February 28th.

February 28th was a Saturday, and therefore a half business day. On Monday, March 1st, Seller tendered the remaining 2,000 pockets in the form of a delivery order for 500 pockets and negotiable warehouse receipts for 1,500 pockets. Seller pointed out that had he mailed the documents February 28th they would not have been received until March 1st.

Buyer refused to accept delivery on the ground (1) that the time of delivery had expired, and (2) that the rice tendered was not in the position required by the contract, i. e. F. O. B. cars San Francisco. Seller contended that repeatedly he had requested shipping instruction from Buyer, who had not given the same and that, in fact, the Seller, at the request of the Buyer, had delayed delivery, a statement disputed by the Buyer. The Buyer contended that the Seller had the right to tender the Rice F. O. B. cars, San Francisco, at any time within the contract period and he would have been obliged to accept such tender. Both parties claimed damages for breach of the contract.

Held, That, there being contradictory evidence as to the reason for the delay in making delivery, the arbitrators resort to the contract, and find that the Seller slept on his rights and failed to make delivery of the Rice in accordance with the contract, and the Buyer is therefore justified in refusing to accept delivery and considering the contract cancelled. The claims of the parties for damages are disallowed. (Rice Association of California Arbitration No. 21, 1920).

Variation in Specific Quantity Sales

The general contract condition covering many commodities in foreign commerce is that when a sale is of a specific quantity, Seller must deliver and Buyer must accept as fulfillment of contract, 5 per cent more or less than the quantity named. While this is the custom under the form of contract, the Foreign Commerce Association has a rule (Rule No. 8) containing this proviso: "provided, however, that Seller shall not be held for short delivery assessed by loss in weight in transit, or in handling after shipment, and up to point of delivery due to causes beyond Seller's control." (Foreign Commerce Association Rule No. 8).

Term "Full Cargo"—When a sale is of a "Full Cargo" (estimated at a stated number of tons) per vessel named and accepted by Buyer, the estimate shall be held to be an approximation only, and the contractual obligation as to quantity shall be "Full Cargo", and Seller must deliver and Buyer must accept quantity shipped in vessel named. (Foreign Commerce Association Rule No. 7).

No Variation in Number of Tank Cars—In sales of **Vegetable Oil,** quantities may be 5 per cent more or less, except that on F. O. B. cars contracts calling for delivery of a given number of tank cars, the exact number of cars must be delivered. (Foreign Commerce Association Rule No. 256, New York Produce Exchange Rule 8).

"About" Number Tons Not Specific Quantity—Term Is Uncertain and Indefinite—5 Per Cent More or Less Clause—A sold to B about 400 long tons of sun-dried Tonga **Copra** in bulk, per sailing vessel "Meteor" from Tonga Islands, estimated sailing date November-December, 1919. Seller delivered 336½ tons to Buyer, who claimed short delivery and demanded 97,380 pounds additional copra in bulk F. O. B. cars Seattle, at 9c per pound net weight, or the difference in value of the copra F. O. B. cars Seattle on January 27, 1920, which it was claimed, was 11c per pound over the contract price of 9c per pound, or 2c per pound. Buyer contended that the uniform Copra contract (Importers and Exporters Association, August 14, 1919), provided in Rule No. 8 (Clause 15-B) for delivery of *not less than 5 per cent less, nor more than 5 per cent more, than the quantity named* and that Seller was obliged to deliver "5 per cent more or less" than 400 tons. Seller contended that the 5 per cent variation limit specified in the rule governing variation in specific quantity sales, did

not apply to the transaction inasmuch as it was not a specific quantity sale, but that the term *about* gave him a wider latitude in the delivery than the rule provides.

Held, That the term *about 400 long tons* is not a specific quantity sale, and Seller therefore is not required to deliver within 5 per cent more or less of 400 tons. The term "*about*" is both uncertain and indefinite as to quantity, and cannot be construed by any usage or custom of the trade as an exact limitation upon an approximation of the quantity fixed in a contract. The use of the phrase *about* in the contract directly implies a wider range of variation than would otherwise have been the case. It would appear from the facts of this case that the "Meteor" carried 676 tons, of which 336½ tons were delivered to Buyer under this contract. In the interests of the parties and of the trade generally the Arbitrators desire to call attention to what they consider careless phrasing of this contract. Had the parties intended that the sale covered a specific lot of 400 long tons the term *about* should not have been used. The claim for short delivery is denied. (Foreign Commerce Association Arbitration No. 22, 1920).

Weights

The rule as to weights varies according to the custom of trade in commodities and is governed by the contract of sale. If a contract calls for "shipping weights", the carrier's weight is taken as final. If a contract specifies "landed weights", the weight of goods as landed is final.

In certain domestic trades, uniform contracts provide the size and style of package, and, as the Federal and various State statutes require the marking of containers, the usual custom is to pack the goods in even weight packages.

When (before the adoption of the 30-day rule by the trade) **Beans** are sold ex warehouse *weights to be adjusted,* a claim of Buyer for an adjustment on weights twenty-eight months after purchase was allowed, but the amount demanded was modified on the ground that both Buyer and Seller were dilatory in making the adjustment. It was in evidence that the Buyer had had the beans reweighed as shipped out of warehouse. The contract specified that public weigher's certificate of weight was to be final. (San Francisco Chamber of Commerce Arbitration, 1922, Page 260).

Under a C. I. F. contract covering **Peanut Oil,** Seller is not responsible for loss in weight after shipment. (San Francisco Chamber of Commerce Arbitration, 1919, Page 64).

Variation in Excess of 1 Per Cent in Weight of Dried Fruit—Public Weights Taken—A sold B a carload of **Prunes.** Upon arrival at destination (Chicago) consignee claimed that the shortage in weight exceeded the one (1%) per cent allowable under the contract of sale, and demanded reimbursement therefor from the Seller, who contested the claim on the ground that the public weigher in Chicago, in arriving at the amount of the shortage, had not weighed the entire shipment, but only ten boxes of each size, and that the weights of the remainder of the shipment were estimated, by multiplying the percentage of boxes so weighed and applying such average to the remaining portion of the shipment. Seller contended that, as each box was weighed when the car was loaded, his weights as taken prior to shipment were, if anything, more reliable than the weights taken at destination. The sale was F. O. B. Pacific Coast.

Held, That while the weigher should have taken ten (10%) per cent as a basis to avoid question, the five (5%) per cent he did take was sufficient to establish the shortage, in that it was taken at destination

by a disinterested party and a public official, whereas the packing house weights were taken in the ordinary course of business by employees of shipper and the goods were thereafter subject to transit. The claim for shortage is therefore allowed and Seller directed to repay Buyer the sum involved, together with costs of weighing. (Dried Fruit Association of California Arbitration No. 259, 1915).

Effect of Changing Dried Fruit Specifications—Trade Custom Does Not Apply—Contract May Not Be Altered Except by Mutual Consent—A sold to B several thousand 25-pound boxes of **Prunes** under the Uniform Dried Fruit Contract. Prior to shipment, Buyer requested that a portion of the shipment be packed in 50-pound boxes, unfaced. In acceding to his request, Seller fixed arbitrarily a differential of one-quarter (¼c) cent between the price of the 50's unfaced and the 25's faced on that portion of the shipment which, at Buyer's request, went forward in 50-pound boxes instead of the 25-pound boxes provided for in the contract. The contract did not give the Buyer the option of designating other packing than that specified when the contract was made. Buyer claimed that he was entitled to the benefit of a differential of three-eighths (⅜c) cents a pound, basing his claim upon a trade custom established in the dried fruit industry. Seller maintained that the trade custom was intended to apply to sales as follows:

First: When goods had been sold on a bulk basis, the Buyer being unable (or permitted) to furnish his assortment of sizes and packing at a late date, and,

Second: To bring about uniformity in changes where the contract especially gave the Buyer the right to change his instructions as to facing and size of packages at a later date.

Held, That the contract, having specifically provided for 25-pound boxes, the trade custom set up by Buyer had no application. We are of the opinion that as the contract did not provide for a variation in packing the Seller was at liberty either to refuse the Buyer's request or state the terms upon which he was willing to comply therewith, which he did in a letter to Buyer. The claim for ⅜c differential on the 50-pound unfaced boxes is disallowed and Buyer is assessed with costs. (Dried Fruit Association of California Arbitration No. 242, 1914).

Delayed Determination of Tare—Unusual Delay in Ascertaining Tare—Guaranteeing of Tare Weights—Under date April 6, 1918, A sold to B 2000 tons of **Copra** in bags, net cash on the net delivery weight, San Francisco.

When the Copra arrived, the Seller notified Buyer that on account of the great variety of bags used in making this shipment, it was impossible for him to get accurate tare in San Francisco, and Seller had therefore to use the tare rendered by his original Seller in Manila, which was 2.02 pounds. Seller suggested that Buyer use the same with his purchaser, Seller on his part agreeing to stand behind Buyer should there be any *bona fide* claim for additional tare.

One lot of this Copra was shipped by Buyer to Minneapolis to a buyer there, and was weighed at Minneapolis on June 13, 1918. The other lot was shipped to Philadelphia and was there placed in storage and was not weighed to determine the tare until some months later.

On April 16, 1919, Buyer made claim on Seller for additional tare on these two lots advising him that the Minneapolis weights showed a tare of 2.88 pounds and that the Philadelphia weights showed a tare of 2.75 pounds, and Buyer claimed an allowance of $2960.86 for a difference in tare.

Held, That Buyer was negligent in not notifying Seller promptly of the difference in tare claimed on the Minneapolis lot so that Seller, if not satisfied, could have had opportunity to check the tare himself. We also consider that Buyer should have notified Seller that the Philadelphia lot would not be delivered to a buyer at that time but would be stored.

The evidence shows that Seller received no notice of any claim for excess tare on either of the above lots until April 16, 1919, although the bags in the Minneapolis lot were weighed June 13, 1918, approximately 10 months previously.

Seller's wire of May 15, 1918, to Buyer agreeing to protect him against any *bona fide* claim for additional tare from Buyer's purchaser, clearly indicates that Seller believed copra had then been sold by Buyer and that if any additional tare should be claimed, he would be notified thereof within a reasonable time. Had Seller known that the copra was not all sold at that time, he might not have given such an open guarantee.

On the other hand, we believe that the bags would have been found to have absorbed some oil and dirt, before arriving at San Francisco had they been weighed here, but it is impossible, of course, to accurately determine, at this time, what percentage of weight this would have been.

While we do not question Eastern weights, the bags certainly would have gained weight in transit and during storage through absorption of oil and dirt, and there is no evidence that the bags when weighed in

the East were thoroughly shaken free of dirt. So it is reasonable to believe that a certain amount of dirt was included in the Eastern weights in addition to that which had been absorbed.

After taking this and all other matters submitted in evidence into consideration, we feel that a fair average settlement would be a tare of 2.42 pounds per sack on both lots.

We, therefore, decide that Seller shall allow Buyer 2.42 pounds tare on both lots of copra in question and that this allowance when made shall constitute full settlement of this case. (San Francisco Chamber of Commerce Arbitration, 1920.)

Seller Responsible for Uneven Weights Under F. O. B. Cars San Francisco Contract When Goods Originate at Interior Point—Containers Must Be in Shipping Condition—A Pacific Coast milling company purchased 3,000 pockets of Fancy California Japan **Rice,** F. O. B. cars, San Francisco. The Seller shipped the rice from an interior point and delivered the goods in warehouse at San Francisco. The Buyer claimed that the bags were in poor condition and that a quantity of the rice had leaked out in transit, resulting in short weights and necessitating scaling to even weights, resowing, and in some instances, resacking. The Buyer demanded that he be reimbursed for these charges. The Seller claimed, that he was not responsible for the variation in weight, in view of the contract provision that *no claims for short weight shall be made where shortage does not exceed one-half of 1 per cent.*

Held, That the contract called for delivery F. O. B. cars San Francisco, and Buyer is entitled to weights at San Francisco, and inasmuch as the same were not furnished, Seller shall pay $70.79, representing 35 bags light weighed, and the cost of resowing 144 sacks. Also the Seller shall put the rice containers in shipping condition at his expense. (Rice Association of California Arbitration No. 11, 1920).

When Sale is on "Weights to be Adjusted"—Weights Should be Taken in Reasonable Time—Both Parties Negligent—First Weight Taken as Average—In August, 1919, A sold to B a quantity of Nagauzura **Beans,** ex warehouse, payment against documents, weights subject to final adjustment on the basis of gross delivered weights, less 1½ pounds tare, public weigher's certificate of weight to be final. The Buyer paid the invoice price on presentation. The invoice was for "approximately 398,800 pounds of beans." December 12, 1921, more than two years after the sale and purchase, the Buyer made claim for an adjustment on 14,469 pounds of beans at $5.75, or a total of

$831.97. The Buyer maintained that the beans had been reweighed as shipped over a period beginning in January, 1920, and ending in December, 1921. The Seller resisted the claim on the ground that the weight adjustment was not made until two years and four months after the sale had been made and Buyer had taken delivery of the goods ex warehouse.

The Seller in his submission to arbitration said:

> "Seller could not possibly be expected to pay for any loss in weight which might have occurred through the moving and shifting of the beans, through possible loss in weight on account of damage by weevils, etc., which is not at all unlikely after a period of two years, and further, in the interim, there was a serious accident to the sprinkling system in the warehouse which damaged at least a part of this lot, as is shown by the fact that it was necessary for the Buyer to remove and recondition a part of the lot. All the Buyer's actions in connection with these matters after delivery of the warehouse receipt to him were taken without consulting Seller in any way. The terms *final adjustment on basis of gross delivered weights* means as between Buyer and Seller, and not as between Seller and one or more outside parties with whom Buyer may have done business and who were absolutely unknown to Seller even at this date.
>
> "The question of reweights is a very important one and should be carefully considered before rendering any decision which would upset conditions and customs which have been in effect for years. It is contrary to the established custom and good business principles to consider claims after such an extraordinary delay (twenty-eight months after warehouse delivery) and a decision in favor of Buyer would set a very dangerous precedent and completely upset long standing customs and conditions prevailing in this trade and other trades generally."

As to the damage to a portion of the lot on account of accident to the sprinkler system in the warehouse, the Buyer pointed out that his weight adjustment claim called for only the gross weight on 448 bags which were damaged by water and no deduction was made for reconditioning or handpicking the beans. The Buyer denied there was any loss in weight due to shifting or moving in warehouse, and none due to weevil as the beans were all sound and free from defects at time of shipment out of the warehouse. In his submission, the Buyer said:

> "I bought these goods in bond ex warehouse, reweights, with 1½ pounds tare allowance, public weighmaster's certificate to be final; thus the contract provides for no other basis of adjustment of weights except on a public weighmaster's certificate. I secured such public weighmaster's certificates, and furnished them in connection with my claim."

As to the long standing trade custom asserted by Seller, the Buyer insisted that no precedent would be established by an award in his favor nor any trade custom upset, but on the contrary would compel Seller to fulfill the conditions of the contract.

Held, That the beans arrived and went into warehouse July 1, 1919, but no withdrawal was taken by Buyer until November 20, 1920, nearly fifteen months later, and we feel that this was over and above a reasonable time for weighing by Buyer. Both parties were at fault in this case. Seller having sold goods "ex warehouse Seattle, Seattle re-weights * * * Public weighmaster's certificate to be final," it was his duty to have stated in the contract that weighing was to be done within some stipulated time, as there was no specified time for adjusting weights mentioned and no rule or recognized custom of the trade as to time in which weighing must be done existed at the time the contract was made. While such a rule was adopted in January, 1920, this would not apply in this contract.

The first withdrawal taken November 20, 1920, showed a loss in weight of 1.834 lbs. per bag, and the arbitrators consider this an average shrinkage for fifteen months' time in warehouse.

We consider that one year in which to take delivery and re-weigh the entire shipment of the beans in this case is the maximum of time in which an adjustment of weights should have been made, in view of the fact there was at the time of making the contract, or at time of payment, no recognized time limit in which to adjust weights.

Consequently we find that 1.75 lbs. per bag on the total 3,988 bags delivered is a fair allowance for shrinkage from time of delivery to warehouse, July 1, 1919, until time of final withdrawal by Buyer, December 7, 1921.

We decide that Seller shall allow Buyer 1.75 lbs. per bag on the entire shipment of 3,988 bags delivered, as full settlement of the difference in weights to be adjusted in this case. (San Francisco Chamber of Commerce Arbitration, 1922).

Delay in Tender of Weight Certificate and Warehouse Receipt Not Justification for Cancellation of Contract—A Pacific Coast importer sold to a San Francisco merchant a quantity of Maruzura

Beans, ex warehouse Seattle. The beans arrived at Seattle ex S. S. "Atsuta Maru" March 21, 1918, and Seller delayed presentation of warehouse receipt for some time. When the documents were presented, Buyer rejected the tender, claiming that Seller was negligent in not forwarding weight certificate and warehouse receipt within a reasonable time after the beans had been stored in his name. Buyer further claimed that he was prevented from reselling the beans because of the absence of these documents. He maintained that he was entitled to cancel the contract on account of this delay.

Held, That delay in furnishing warehouse receipt and weight certificate was not sufficient grounds for Buyer to cancel the contract, or to consider it cancelled, for the reasons given in his statement. We feel that Seller was negligent in not securing and forwarding to Buyer the warehouse receipt within a reasonable time after the beans had been stored in Buyer's name. We do not consider, however, that the delay in furnishing warehouse receipt and weight certificate was sufficient grounds for Buyer to cancel the contract, for the lack of these documents would not, under general trade custom, have prevented him selling the beans if he had an opportunity to do so. Buyer claims he was unable to sell the beans as it is against his policy to make a sale of beans without having in his possession the aforesaid documents, but the Committee can find nothing which would have prevented his making sales immediately after receiving Seller's notification of March 21, 1918, that the 600 bags of beans in question had arrived at Seattle on a designated steamer.

We decide this case in favor of Seller, and we decide that the contract in question is still in force and that Buyer must receive and pay for the 600 bags of beans. (San Francisco Chamber of Commerce Arbitration, 1918).

Buyer Entitled to Weights at Destination in Absence of True Shipping Weights—Under a contract for **Beans** sold F. O. B. cars Stockton, Buyer gave instructions to make shipment to St. Louis after weighing the beans as loaded into the car. Seller failed to have weighing done as instructed, and weights were certified by a public weigher at St. Louis, showing a shortage of 789 pounds in the billed weights and the arrival weights. Buyer claimed an allowance for the loss in weight.

Held, That Buyer is entitled to correct weights at time of shipment, failing which, weights taken at destination by disinterested weigher shall govern, and Buyer's claim is allowed. (San Francisco Grain Trade Association Arbitration, 1915).

When Contract Specifies "Usual Packing" for Peanuts, Weight May Exceed 100 Pounds Per Bag—Term is Uncertain —Effect of Delay in Acting Upon Rejection—A sold to B 100 tons Chinese **Shelled Peanuts** 30/32s from Shanghai, f. a. q. of the Season, *usual packing*. When the goods were tendered, the delivery order indicated that the bags weighed 180 pounds each, and Buyer rejected on the ground that *usual packing* was in bags weighing 100 pounds net each. Notice of rejection was given March 11th, but Seller did not act thereon until March 23rd, twelve days later, when he insisted upon acceptance of tender. A third complaint by Buyer was that the goods did not conform to contract count.

The arbitrators took up the three questions involved in the following manner:

"PACKING—The word *usual* in a contract to designate packing is subject to criticism as not being specific and opening the door to dispute. It was brought out in the arbitration that some peanuts are shipped from China in various sized packages, namely, 200-lb., 180-lb., 160-lb. and 100-lb. Investigation developed the fact that 100-lb. packages when used in shipments from Chinese points, are no more *usual* than other weights and the condition and quality of the commodity was in no way deteriorated as the result of the packing, but that in this particular case, in as much as both the Buyer and Seller apparently had in mind 100-lb. packages, should the Buyer find it necessary to repack these peanuts into 100-lb. packages the Seller should be called upon to pay the expense both as to costs of bags and the labor, but shall receive in return the empty 180-lb. bags. All other expenses incurred shall be for the account of the Buyer.

"DELIVERY—The contract specifically provides that *Rejection by Buyer and acceptance by Seller constitutes delivery*. The rejection was made by the Buyer but no acceptance was acknowledged by Seller and if delayed it was clearly the Buyer's duty to have strengthened his position properly by insisting upon a prompt specific acceptance or refusal. In any event the matter became a dispute which is provided for in the contract to be settled by arbitration and, *therefore, as the delay was permitted by Buyer* it is no ground for rejection.

"GRADING—The arbitrators made two different tests of two different samples made at two different times from the shipment, which average within the count 30/32s, and these taken in connection with the general quality of the nuts, do not justify rejection." (Foreign Commerce Association Arbitration No. 13, 1920).

Award Approved on Appeal—The Buyer appealed from the award, the arbitrators on appeal saying:

"The arbitrators herein do not consider that the original arbitrators were justified in asserting or assuming the reference made by the Buyer to a conversation had with the Seller at his office after tender indicated that *both Buyer and Seller apparently had in mind 100 pound bags.* They do not consider it important as to whether Buyer and Seller did or did not have 100 pound bags 'in mind' so long as they did not specifically provide therefor in the contract. They do not consider the conversation referred to justifies this assumption, but as the original arbitrators conceded to the Buyer the privilege of putting the goods into 100-pound bags, and the Seller has not appealed therefrom, that portion of the findings must stand.

"They quite agree with the statement that the word *usual* in a contract opens the door to controversy, and is not sufficiently definite to properly and specifically express the intention of the parties. What may be usual during any given period may, under present world conditions, cease to be *usual* within a very short time thereafter, and in the interest of good business and the avoidance of any mode of expression that may result in controversies between business men, the greatest care should be used in drawing contracts to cover important features definitely and specifically.

"They do not consider the arbitrators were justified in the statement that 100-pound bags were no more usual than other weights, so they find that the 100-pound bag is employed in packing import shelled peanuts more frequently than other bags, but not to such an extent as to make it an invariable condition in the case of such importations. The use of the term *usual packing* in the provisions of the contract is not, therefore, sufficiently definite to warrant Buyer's rejection of the tender because of the fact that the nuts were packed in bags of 180 pounds net weight each, rather than in bags of 100 pounds net weight each.

"As to appellant's contention set forth in his brief that because of the reference made by the arbitrators to the conversation above referred to, the findings thereby establish "absolutely beyond any doubt whatsoever the fact that when the Seller and the Buyer entered into the contract for the purchase and delivery of these peanuts they contracted for peanuts in bags of 100 pounds each." They cannot imagine that such construction could possibly be placed upon the language used and are of the opinion the arbitrators were merely justifying the consideration given Buyer on his contention for the 100-pound bags.

"So far as the argument of the appellant is concerned on the question of tender and rejection, the arbitrators feel that prompt tender was made; that sample was submitted here as a matter of accommodation to Buyer; that after Buyer's rejection which was also based upon count as the result of the so-called private certificate; that Seller used due diligence in refuting this claim by obtaining Chamber of Commerce certificate from Seattle, thereby confirming his original tender to Buyer as being good as to count, and that this question being further verified by the arbitrators, their finding thereon must be sustained. The further delay Buyer appears to be wholly responsible for, as he has unnecessarily procrastinated over a period from April 26th, when he served his notice of appeal, to June 2nd, when he filed his appeal brief.

"In view of the foregoing the arbitrators herein unanimously sustain the original findings and award and further find:

> That Seller is entitled to interest at the rate of six per cent on the amount due from April 26th date of original findings, to date of payment and shall not be held responsible for any deterioration in the nuts from said date. (Foreign Commerce Association Arbitration No. 13A, 1920).

Arbitration Methods of Various Commercial Bodies.

In the commercial world, merchants have banded together in numerous trade associations, boards of trade and chambers of commerce. Usually these are private corporations the object of which is to afford groups of individuals a common meeting ground for the purpose of carrying on trade, and no such organization is modernly conducted unless it provides a method for settling by arbitration disputes that arise in trade.

The man in commerce is confronted with the question, "Must I take delivery of the goods tendered?" or "Must I make delivery of the goods under contract?" It is vital that he obtain a definite determination of the issue, for time is the essence of the matter. In the case of goods subject to a wide range of fluctuation in price it is necessary, if losses are to be avoided, that a positive, if unpolished answer be given. Hence it is that commercial bodies have erected their own forums, where prompt action is the rule. Technicalities are swept aside. The question to be decided usually is stated with certainty, clarity and directness. Facts are essential. Equivocation is given short shrift. And in a vast majority of cases it is evident that equity is done since arbitration is favored by reputable merchants who seek an end to unprofitable, prolonged and provocative controversy. Rarely are arbitrators in commercial disputes called upon to decide questions of law. When the issue involves such questions usually they are left to the determination of the courts and legal profession.

The question often is asked, "Of what binding force and effect are arbitrations unless conducted under the statute?" Within trade organizations and commercial bodies the decisions, awards and findings of arbitrators, in ninety-nine out of a hundred cases, are complied with immediately. Some organizations have a method of appeal from a decision to another committee invested with power to ratify, modify or reverse the award of the original arbitrators, and a dissatisfied party has the right of invoking the appeal. Upon final decision, however, prompt compliance is necessary, else the recalcitrant party invite punitive action on the part of the body before which the arbitrament has been held, and if he be a member thereof, he may be either suspended or expelled for non-compliance therewith. No reputable business man desires, nor can long withstand, the opprobrium of having repudiated an arbitration award of his fellows in trade after pledging his honor to be bound by such award. The records of more than three thousand

arbitrations with which the authors are intimately familiar will not disclose more than a score of such instances of repudiation and only in very rare cases has it been necessary to exercise the power of expulsion by the leading organizations that have placed arbitration foremost among their activities. Indeed, experience has shown that business is on a more elevated plane, with a smaller percentage of contentions, repudiations of contracts and generally a higher regard for the equitable rights of the parties in those branches of commerce which have educated the trade to the soundness and fairness of adjustment of disputes by disinterested arbitration, which insures speedy settlement, at the least possible expense, and leaves the parties to the pursuit of their more profitable and desirable occupations.

In making a submission to a commercial body of any dispute, parties to the arbitration should bear in mind that various methods are employed and certain rules and regulations established, with which there must be substantial compliance. None of the methods is either involved or intricate, the idea of trade bodies being to make simple and readily accessible to business men a method of prompt relief. Nevertheless, it is essential that the initial steps be taken in order to facilitate the hearing and expedite the award.

Herewith are published the rules of some of the leading trade organizations and Chambers of Commerce in the United States for the guidance of persons desiring to avail themselves of arbitration under the jurisdiction of such organizations.

An examination of the methods of arbitration adopted by various trade bodies will enable the business man readily to make a submission to such organization as he may select as the forum for adjudicating his differences. Likewise, attorneys will be better able to serve their clients by having information as to the rules under which they may be called upon to submit for clients.

CHAMBER OF COMMERCE OF THE STATE OF NEW YORK.

This organization was the first in America to make available to merchants the services of an arbitration committee. From 1768 to the present time, this body has been an earnest advocate of arbitration, and in all those years, with only a brief interruption, its committee on Arbitration and committee on Appeal have been functioning. To the initiation and industry of its officers also we may attribute the reformation in the law of New York whereby an agreement to arbitrate is enforceable like any other provision of a contract, and such agreement is non-revocable.

Therefore, the method of arbitration in use by the Chamber of Commerce of the State of New York is the result of many years' practical development, and is and has been effective for the particular purposes for which it was designed.

The by-laws of the Chamber of Commerce of the State of New York provide that the Committee on Arbitration shall have complete supervision of all matters of arbitration referred to the Chamber and shall make rules and regulations for the conduct and disposition of all matters submitted in arbitration; it shall provide a form of agreement not inconsistent with existing provisions of law by which, so far as practicable, the decision of the arbitrator or arbitrators shall become as effective as a judgment of the Supreme Court. The by-laws provide:

"It shall compile and from time to time, revise and keep a list of qualified persons, not less than fifty, willing to act as arbitrators under these rules, who shall be members of the Chamber. This list shall be known as the List of Official Arbitrators of the Chamber of Commerce.

"Any matter in controversy may be referred by the disputants signing the form of agreement provided by the Committee, together with a stipulation to the effect that they will abide by the decision of the arbitrator or arbitrators, by them selected, and waiving any and all right to withdraw from such submission after the acceptance of their appointment by the arbitrator or arbitrators selected, and designating at their option either

"(a) One of the persons named in said 'List of Official Arbitrators,' who shall act as sole arbitrator; or

"(b) Any two person to act as arbitrators, who in turn shall designate from said 'List of Official Arbitrators,' a third person to be associated with them as arbitrators; or

"(c) The Committee on Arbitration of the Chamber of Commerce or a quorum thereof.

"In any case the Committee on Arbitration may, in its discretion, decline to entertain a matter submitted for arbitration, in which event the selection of special Arbitrator or Arbitrators shall be void.

"The Committee on Arbitration shall, from time to time, establish a schedule of moderate fees to be paid in all matters submitted, which fees shall be chargeable as decided by the arbitrators.

"The Secretary of the Chamber of Commerce shall be the Clerk of the Committee on Arbitration."

The following is the form of oath administered to the arbitrators:

> "We, the undersigned, do each for ourselves solemnly swear that we will faithfully perform the duties of a member of the Committee on Arbitration of the Chamber of Commerce

of the State of New York, and faithfully and fairly hear and examine all matters in controversy submitted to us as members of said Committee under the provisions of law authorizing said submission, and to make a just award according to the best of our understanding."

The following rules and regulations govern arbitrations before this body:

RULES AND REGULATIONS

I.

All submissions shall be in proper form and a copy filed with the clerk, duly acknowledged before a notary or other authorized official as required by law, together with sufficient evidence of proof of authority in the case of an agency, partnership or corporation,

(a) If signed by an agent, duly authenticated copy of his power of attorney;

(b) If signed by one or more partners, written consent from co-partners not signing submission;

(c) If signed in behalf of a corporation, duly certified copy of resolution authorizing submission.

II.

The proceedings shall not be public unless requested by the parties. Members of the Committee on Arbitration may be present at any of the hearings. The records shall be open at all times to members of the Chamber of Commerce and others upon the written order of the Committee on Arbitration.

III.

The hearing of cases shall commence as soon as practicable after submission, and shall be pressed to speedy termination.

IV.

All irrelevant or unimportant matters shall be excluded.

V.

The Arbitrators shall construe these rules and the submission to them as being designed to secure reason and equity in matters of trade and commerce, with the least possible expenditure of time, energy and money and in such manner as to avoid all unnecessary irritation.

VI.

If three Arbitrators are chosen, the one chosen from the "List of Official Arbitrators" shall act as Chairman.

VII.

Each party to the Arbitration shall be entitled to a copy of the award.

VIII.

The Chamber of Commerce will provide the parties who submit to Arbitration under its rules, with adequate room and all necessary forms and papers free of charge, and through its Committee on Arbitration, will endeavor to do or cause to be done all such acts as it properly may do for the purpose of assisting the parties and the Arbitrators in the course of an Arbitration.

IX.

Each party shall furnish his own witnesses, paying the fees thereof.

X.

A competent stenographer shall be employed, and the expense for this service is to be charged against the parties to the submission as the Arbitrators may decide.

XI.

In case of any misunderstanding or any question concerning the interpretation of these Rules and Regulations, the decision of the Committee on Arbitration of the Chamber of Commerce, shall be accepted by the parties as conclusive.

XII.

Wherever the word "Party or Parties" is used in these rules it shall refer to the parties to the submission, and whenever the word 'Arbitrator" or "Arbitrators" is used it shall refer to the Arbitrator or Arbitrators as the case may be, whether there are one or more. Whenever the word "Committee" is used, it shall refer to the Committee on Arbitration of the Chamber of Commerce. Whenever the word "Clerk" is used, it refers to the Clerk of the Committee on Arbitration.

FEES.

All fees of Arbitrators, expense for stenographers and other minor expenses shall be awarded as the Arbitrators may decide.

DEPOSIT.

The parties to the submission shall each deposit with the Clerk at the time of filing the submission, the sum of $60.00—or at the discretion of the Committee, a larger amount—which shall be disbursed by him for their account in payment of Arbitrators' and stenographers' fees and minor expenses:

(a) Arbitrators' fees: $10.00 per day or part thereof;

(b) Stenographers' fees: The usual remuneration.

(Note.—The fees for stenographer are based on the following: 25 cents per folio of 10 lines, and 5 cents per folio each for the second and third copies.)

If the deposit appears insufficient to the clerk, or becomes exhausted, he shall call upon the parties equally for such further sums as may be required: Any balance to be refunded as the Arbitrators may decide.

THE CLERK.

The duties of the Clerk of the Committee on Arbitration shall be as follows:

He shall receive and file all submissions, all copies of awards, give notice of all hearings, keep a docket of all cases, and such other books and memoranda as the Committee shall from time to time direct. He shall render all necessary assistance to the Arbitrators, attend to their clerical work; receive and disburse all fees and costs and keep careful and accurate account thereof, under the supervision of the Committee on Arbitration.

If the clerk of the Committee on Arbitration is unable to attend, the Assistant Secretary of the Chamber of Commerce shall take his place.

AMENDMENTS.

The Committee reserves full power to amend, add to or omit any of these rules from time to time, as may be found expedient.

The "List of Official Arbitrators" is revised whenever necessary. The list contains the names of several hundred persons, recognized leaders in New York among the special businesses for which they have consented to act. This list can be obtained from the Secretary, Chamber of Commerce of the State of New York, 65 Liberty Street, New York City.

FOREIGN COMMERCE ASSOCIATION OF THE PACIFIC COAST.

Arbitration is provided for by the Foreign Commerce Association of the Pacific Coast, and to the extent that a member may be expelled for refusing to arbitrate a dispute arising out of the Association's Uniform Contract, submission to arbitration on the part of members is compulsory. A member, however, must have been a principal in his contractual relation with the other party, for if he shall have acted in the capacity of an agent for a revealed principal, he will not be compelled to arbitrate in place and stead of the principal; this for the reason that an agent, when acting for a disclosed principal, has no power to submit to arbitration without express authority from the principal, and if the agent acts without authority he would bind only himself as a principal, and an adverse award would be enforceable against the agent.

The method of submission and procedure in arbitration in the Foreign Commerce Association of the Pacific Coast mark a departure from those customarily followed by various trade organizations.

The usual form of arbitration agreements are executed by the parties, who may do so jointly or severally. Both parties then submit their respective contentions in writing to the Chairman of the Association, who is the executive officer thereof. After both parties have filed their written statements, the Chairman sends to each the statement of the other, and each has the opportunity to answer the other. The original statement and the replies thereto are submitted to three disinterested arbitrators, the utmost care being taken to delete all names and identification marks from the papers so that the identity of the parties to the arbitrament, so far as the arbitrators are concerned, is concealed. The arbitrators are appointed by the Chairman with a view to their especial qualification for the particular issue submitted. Obviously personal appearance or presentation is not permitted, except in extraordinary cases, and then it follows as of course that the identity of the parties is revealed.

The object of this effort at secrecy is to prevent any possibility of favoritism as between members and non-members. While it is true that arbitrators are men of integrity and give to the cause their honest, independent consideration and render awards consonant with sound justice and equity, the party resident abroad or in another section of the United States, may be of the opinion that his interests might be prejudiced, the effort to conceal the identity of the parties until after award made must tend to convince him that a sincere attempt is made to adjudge the matter on its strict merits and decide accordingly.

The plan of refusing the parties the right of personal appearance was prompted by the same spirit of fairness, for it goes without saying that a party to an arbitrament who has his abode thousands of miles from the place of consideration would not have the same opportunity of adequate representation before arbitrators as one residing at the place of arbitration.

Hence, by denying all the opportunity to be represented in person or by attorney, and requiring each party to an arbitration to present his case in writing, by concealing from the arbitrators the true identity of the parties at interest until after award made, and by the exercise of the greatest care to bring out the issues as raised under the submission, this Association has proved the efficacy of this method of procedure. No matter where the parties are domiciled their interests are fairly presented and honestly considered.

The foregoing fully explains the procedure followed by the Foreign Commerce Association of the Pacific Coast.—*H. A. D.*

The following rules govern arbitrations:

Rule 100. When arbitration under these rules is applied for by either party to a contract such arbitration shall, in the absence of agreement to the contrary, be held before the Foreign Commerce Association of the Pacific Coast. Such arbitration may, at the option of the parties, be held at either the San Francisco or Seattle office of the Association. In the event the parties fail to designate the place, or if they fail to agree thereon, the Chairman of the Association shall designate the place of arbitration.

Rule 101. All communications relative to arbitration shall be addressed to the Foreign Commerce Association of the Pacific Coast at Seattle or San Francisco.

Rule 102. Three arbitrators shall serve on each case and the agreed decision of any two shall be binding on all parties. The dissenting arbitrator shall, however, sign as dissenting thereto and may give reasons therefor.

Rule 103. The fee in all cases of arbitration shall be $50.00, which amount shall be deposited with the Foreign Commerce Association, by each party together with application for arbitration, but the party in whose favor decision is rendered shall be entitled to a return of his deposit when the findings are forwarded to him.

Rule 104. The following is the form of request for arbitration:

"The undersigned hereby requests that an arbitration be held at..
before the Foreign Commerce Association of the Pacific Coast, and under the rules of said Association, in the matter of

....

and hereby agrees and promises absolutely to abide by the award and findings of the arbitrators, and in the event of an adverse decision, to make prompt settlement and likewise pay the fees and costs as provided for in the Rules of said Association.

"Check for $50.00 for deposit on account of said arbitration fee enclosed herein."

(Signed) ....

By..

Rule 105. Written statements of fact, together with written arguments thereon, must be presented in quadruplicate to the Foreign Commerce Association of the Pacific Coast, which shall be submitted in their entirety to the arbitrators, but no oral evidence shall be given unless requested by the arbitrators.

Rule 106. Immediately upon receipt thereof, the Chairman of the Association shall submit a copy of the statement of fact to the respective parties to the arbitration, and each shall have the right to reply thereto, but if no such answer is made by either party within a reasonable time, it shall be considered a waiver of the right of answer. Provided, there shall be no interchange by the Chairman of any exhibits submitted in connection with any statement of fact.

Rule 107. Sample, if required, shall be drawn and forwarded to the Association in accordance with the Rules covering the commodity in dispute. In the event parties to an arbitration disagree as to the sample or samples to be used for arbitration, the Arbitration Board shall obtain same in such manner as it shall elect. The losing party shall bear any and all expense connected with taking and forwarding samples.

Rule 108. The findings and award of the arbitrators shall be in writing, signed by the arbitrators, fully setting forth the facts of the case and a copy thereof shall immediately be furnished the parties to the dispute.

Rule 109. When arbitration finding is based upon samples, the sample on which arbitration was held shall, on immediate request, be returned to the owner at his expense.

Rule 110. A member of the Association who refuses to submit to the Association any dispute arising out of a contract providing for arbitration under the Rules of this Association, or who fails or refuses within a reasonable time to abide by the findings and award of the arbitrators, except in case of an appeal, shall be reported to the Advisory Committee by the Chairman and such committee shall have power to act in such manner as the facts warrant, and may suspend or expel such member, reporting such action to the membership.

Rule 111. An appeal from any decision of arbitrators may be made to a Board of Appeal of this Association, no member of which shall have been an arbitrator in the matter appealed from. Notice of such appeal shall be given within three full

business days after receipt of official copy of findings and award, and shall be accompanied by a certified check in the sum of $250.00, which sum shall be retained by the Association if decision of arbitrators is upheld, and returned if not upheld. If decision of arbitrators fixed a sum of money to be paid by appellant, a certified check in the sum so fixed, payable to the Foreign Commerce Association of the Pacific Coast or order, shall accompany the notice of appeal. If decision of arbitrators is upheld, check shall be paid to the party in whose favor the original award was made, and if decision is reversed check shall be returned immediately to appellant. All expenses incurred by the Board of Appeal may at the Board's option, be assessed against the losing party.

Rule 112. The arbitrators shall receive for their services from the Association such portion of the arbitration fee as the Association may provide.

NEW YORK PRODUCE EXCHANGE.

The New York Produce Exchange is empowered by its charter to elect five members of the Exchange as a committee to be known and styled "The Arbitration Committee of the New York Produce Exchange." It shall be the duty of the Arbitration Committee to hear and decide any controversy which may arise between the members of the Association, or any person claiming by, through, or under them, and, as may be voluntarily submitted to the committee for arbitration: and such members and persons may, by an instrument in writing, signed by them and attested by a subscribing witness, agree to submit to the decision of such committee any such controversy which might be the subject of an action at law, or in equity, except claims of title to real estate or to any interest therein, and that a judgment of the Supreme Court shall be rendered upon the award made pursuant to such submission.

Such Arbitration Committee, or a majority of them, shall have power to appoint a time and place of hearing of any such controversy, and adjourn the same from time to time as may be necessary, not beyond the day fixed in the submission for rendering their award, except by consent of parties; to issue subpoenas for the attendance of witnesses residing or being in the Metropolitan Police District. All the provisions contained in Title 14, Part 3d, Chapter 8, of the Revised Statutes, and all acts amendatory or in substitution thereof, relating to issuing attachments to compel the attendance of witnesses, shall

apply to proceedings had before the Arbitration Committee. Witnesses so subpoenaed as aforesaid shall be entitled to the fees prescribed by law for witnesses in the Courts of Justice of the Peace.

Any number not less than a majority of all the members of the Arbitration Committee shall be competent to meet together and hear the proofs and allegations of the parties, and an award by a majority of those who shall have been present at the hearing of the proofs and allegations shall be deemed the award of the Arbitration Committee, and shall be valid and binding on the parties thereto. Such award shall be made in writing, subscribed by the members of the committee concurring therein, and attested by a subscribing witness. Upon filing the submission and award in the office of the clerk of the Supreme Court of the City and County of New York, both duly acknowledged or proved in the same manner as deeds are required to be acknowledged or proved in order to be recorded, a judgment may be entered therein according to the award, and shall be docketed, transcripts filed, and executions issued thereon, the same as authorized by law in regard to judgments in the Supreme Court. Judgments entered in conformity with such award shall not be subject to be removed, reversed, modified, or in any manner appealed from by the parties thereto, except for frauds, collusion, or corruption of said Arbitration Committee, or some member thereof.

The By-laws of the Produce Exchange provide:

> Sec. 28. As soon as practicable after the election of the Arbitration Committee, the members thereof shall organize by the election of a chairman from among their own number. The Secretary, either in person or by substitute, shall act as clerk of the Committee. Before entering upon the duties of their office, the members of the said Committee shall be required to take or subscribe to the following oath or affirmation, viz:
>
> "You do severally swear that you respectively will faithfully and fairly hear and examine the matters in controversy which may come before you during your tenure in office, and to make a just award therein, according to the best of your understanding, so help you God."
>
> Sec. 29. All persons who may desire the services of the Arbitration Committee shall file with the Secretary of the Exchange an agreement in writing to submit their case to the Committee, and to be bound by its decision, which agreement shall be signed by the parties thereto, and attested by a subscribing witness. On the filing of such agreement the

Secretary shall call a meeting of the Committee, to be held as soon thereafter as may be convenient to the parties concerned, to hear and decide such controversy. The Committee shall have power to adjourn the hearing of any case from time to time, as circumstances may require. All awards by said Committee shall be rendered in conformity with Sections 5, 6, and 7 of the Charter.

Sec. 30. The proceedings of the Arbitration Committee shall be recorded in a book to be kept for that purpose, in which shall be entered a summary of each controversy submitted for the decision of the Committee and the award made thereon. Said book shall be the property of the Exchange, and subject to the inspection of its members on application to the Secretary.

Sec. 31. Each member of the Arbitration Committee who shall be present at the hearing of any case shall be entitled to a fee of five dollars for each sitting; to be paid by the party against whom the decision shall be rendered, except in such cases as the Committee, at their discretion, shall otherwise order.

CHICAGO BOARD OF TRADE.

Under the by-laws of the Board of Trade of the City of Chicago, Committees of Reference and Arbitration and Committees of Appeal are authorized for the settlement of such matters of difference as may be voluntarily submitted by members or non-members. The acting chairman of either of said committees, when sitting as arbitrators, may administer oaths to the parties and witnesses, and issue subpoenas and attachments, compelling the attendance of witnesses, the same as Justices of the Peace, and in like manner directed to any constable to execute. The charter provides as follows:

"When any submission shall have been made in writing, and a final award shall have been rendered, and no appeal taken within the time fixed by the Rules or By-laws, then, on filing such award and submission with the Clerk of the Circuit Court, an execution may issue upon such award as if it were a judgment rendered in the Circuit Court, and such award shall thenceforth have the force and effect of such a judgment, and shall be entered upon the judgment docket of said court."

The rules governing arbitration provide:

Section 1. It shall be the duty of the Committee of Arbitration to hear and determine all cases of disputed claims

voluntarily submitted for their adjudication by members of the Association. All evidence in such cases shall be taken under oath or affirmation, except documentary evidence, which shall be sworn to, if demanded by either party and the committee decide it to be necessary, and shall be duly recorded. In all such adjudications the committee shall construe all Rules, Regulations and By-laws of the Association as being designed to secure justice and equity in trade; and all awards or findings shall be made in conformity therewith.

In case either party shall so demand, by previous notice given to the Secretary, the testimony and proceedings of the Committee of Arbitration shall be taken by a stenographer, the cost of which shall be assessed by the committee as in cases of other costs incurred.

Sec. 2. Any award or finding of the Committee of Arbitration may be appealed from, and the case may be carried to the Committee of Appeals for revision; provided, notice of such appeal shall be given to the Secretary, in writing, within two business days after such award or finding shall have been delivered to the parties in controversy.

Sec. 3. It shall be the duty of the Committee of Appeals to review such cases as may be appealed from the Committee of Arbitration and formally brought before it, and its awards or findings shall be final and binding, and shall not be subject to revision by any other tribunal of the Association; provided, the Board of Directors may determine from the record and other evidence, as to the proper constitution of any committee and as to the regularity of its proceedings. The said Committee of Appeals shall receive such new evidence as may be offered under oath or affirmation; and if, in its judgment, evidence is produced which will justify a rehearing of the case by the Committee of Arbitration, it shall remand the case to the said Committee of Arbitration for a new trial. Any final award or finding of the Committee of Appeals shall be based on the record of the Committee of Arbitration, and shall be made in like manner as prescribed by Section 1 of this Rule.

Sec. 4. Five of either of these committees shall be a quorum for the transaction of business, and a majority decision of such quorum shall be binding.

Sec. 5. The Committee of Arbitration and the Committee

of Appeals shall each render their awards or findings in writing, through the Secretary of the Association, within two business days after their decisions shall have been made. Such awards or findings shall be signed by the Chairman of the Committee and shall be certified by the Secretary under the seal of the Association. The official records and decisions of these committees, and all other records of the Association, may be inspected by any member of the Association upon application to the Secretary.

Sec. 6. When, from absence or disqualification of regular members, either the Committee of Arbitration or Appeals cannot be formed, the parties in controversy shall be allowed to fill vacancies with any member or members of the Association willing to serve (not being of the other committee), on whom they may agree, or, if such parties are unwilling to submit their case to the Committee of Arbitration, they may choose three or more members (willing to serve and not being of the Committee of Appeals) whom they may agree upon; such agreement, in either case, to be communicated to the Secretary in writing, signed by all the parties in controversy. A majority award or finding of any such committee shall be binding, and any award or finding of committees thus formed shall be made under the same Rules, and shall have the same effect as if made by the regular committees, respectively.

Sec. 7. Before entering upon the duties of their office the members of any Committee of Arbitration or Committee of Appeals shall be required to take or subscribe to the following oath or affirmation, viz.: "You do solemnly swear (or affirm) that you respectively will faithfully and fairly hear and examine all matters of controversy which may come before you during your tenure of office, and that you will in all cases make just and equitable awards or findings upon the same, in conformity with the Rules, Regulations and By-laws of the Association, and according to the evidence, to the best of your understanding; so help you God."

Sec. 8. The Chairman or Acting Chairman of any Committee of Arbitration or Appeals shall have power to administer suitable oaths to the parties and witnesses, and to issue citations to witnesses.

Sec. 9. Parties desiring the services of either of the foregoing committees shall notify the Secretary to that effect

in writing, and, before the hearing of the case, shall file an agreement with him, signed by the parties to the controversy, binding themselves to abide, perform and fulfill the final award or finding which shall be made touching the matter submitted, without recourse to any other court or tribunal. Neither party shall postpone the trial of a case longer than ten days after it has been submitted, unless good cause can be shown therefor, satisfactory to the committee. Trifling and unimportant matters shall not be entertained by the Committee of Arbitration. Any member of a firm may execute said agreement on behalf of such firm.

Sec. 10. Members of the Committees of Arbitration and Appeals failing to attend when their services are required may be fined, for the use of the Association, three dollars for each default, unless a satisfactory excuse shall be made to the Committee.

Sec. 11. The fees for arbitration, under the Rules, By-Laws and Regulations of the Association, shall be as follows:

For each case where the amount in controversy shall be under $500.00 .... $10.00

Where the amount in controversy shall be from $500 to $1,000 .... $15.00

Where the amount in controversy shall be from $1,000 to $1,500 .... $20.00

Where the amount in controversy shall be from $1,500 to $2,500 .... $25.00

Where the amount in controversy shall be from $2,500 upward $50.00

The fees as above, shall be paid in advance, to the Secretary, by the party bringing the case, and shall be equally divided between the members of the Committee hearing the case.

Sec. 12. The fees of the Committee of Appeals shall be the same as the fees in the same case before the Committee of Arbitration; and they shall be paid and disposed of in the same manner.

Sec. 13. If parties to a controversy fail to appear at the time set for trial, or request a postponement, they may (if the case is postponed) be assessed with costs, by and for the use of the committee, in any sum in the committee's discretion, not exceeding five dollars. The committee, however, may insist that the trial shall take place without postponement.

Sec. 14. When neither of the parties in the controversy is a member of the Association, the aforesaid fees may be doubled. Fees, and all additional costs that may be incurred in the investigation of suits, shall be finally paid by either of the parties in the case, as may be decided by the committee hearing the same, and shall be included in their award or finding.

THE NEW ORLEANS BOARD OF TRADE, LIMITED.

Arbitration is provided for by the New Orleans Board of Trade, Limited, the general committee on arbitration consisting of five members, three constituting a quorum. Any member of the Board of Trade refusing to submit to arbitration under its rules, provided the amount at issue, and claimed as damages in arbitration other than on maritime matters, shall not exceed $800, and provided further, that the amount at issue and claimed as damages in arbitrations on maritime matters shall not exceed $1,000, shall be reported to the Board of Directors, and be by them tried thereon, and be suspended or expelled, as they may deem just and proper, or be entirely discharged. Trifling unimportant matters shall not be entertained by any committee on arbitration. Any member, or duly authorized agent, of a firm may execute the agreement in arbitration on behalf of said firm.

Section 17 of the by-laws of the New Orleans Board of Trade, provides:

> "Disputes between members of the Association with persons not members may be referred to and decided by the respective Committees on Arbitration; provided, parties to such disputes who are not members of the Exchange shall agree, in writing, to abide by the decision of the Committee, and the rules of the Exchange governing in such matters, and give security, in advance, to the member contesting to cover any probable award. All such cases of arbitration shall be taxed the same fee, to be paid by the losing party as in cases arising between members."

The by-laws provide for other arbitration committees, as follows:

Maritime Matters—Having jurisdiction of all claims, differences and controversies between members of the Board of Trade on question of ocean freight and all matters covered by the port rules. The secretary and each of the arbitrators shall be entitled to a fee of $5.00 in cases involving $250 or less, and a fee of $10.00 in cases involving over $250 for each and every sitting. The fees and other necessary expenses incident to taking testimony shall be paid by the unsuccessful party,

unless the arbitrators order otherwise. An appeal from any decision of this committee lies to the governing committee of the Maritime Branch of the Board of Trade.

Clean and Rough Rice—Two committees having jurisdiction of cases pertaining respectively to Clean and Rough Rice. The general arbitration rules and the rice rules govern these submissions. The fee is $15.00. Appeals from an award of either of these committees lies to the Rice Committee.

Grain—Having jurisdiction of disputes arising out of the sale and purchase of grain. An appeal lies to the Grain Committee. When other questions are involved, in regard to export shipments of grain, an appeal lies to the Committee on Maritime Matters.

In addition to the foregoing arbitration committees specially provided for by by-laws, special committees on arbitration, consisting of three, as to specific commodities, are allowed upon mutual request. An appeal shall lie to the standing committee having jurisdiction of the commodity at issue.

The various committees on arbitration may grant a new trial on such new evidence as was not in the purview of the applicant or could not have been obtained by due diligence at the time of the trial, and may be offered under oath or affirmation, provided such application for rehearing is filed within forty-eight hours after notice of decision has been received.

The by-laws further provide:

> The duties of the General Committee on Appeal shall be to review such cases as may be appealed from the General Committee on Arbitration, and formerly tried before the Committee, and its awards or findings shall be final and binding, and shall not be subject to revision by any tribunal of the Association, provided the Board of Directors may determine from the record or other evidence whether such Committee was properly constituted and its proceedings regular, and in the event of the Board deciding that such was not the case, it shall have power to amend or alter any award of the Committee in question.
>
> Any award or finding of any Committee on Appeal shall be based on the record of the Committee on Arbitration that arbitrated the case, and shall be made in like manner.
>
> In cases of appeal, the contestants shall have the privilege of filing a brief and appearing before the Committee on Appeal, provided no new evidence be introduced and the argument is confined to the record.

If parties to a controversy fail to appear at the time set for trial, or request a postponement, they may, in the Committee's discretion, if the case is postponed, be assessed with costs by and for the use of said Committee in any sum not exceeding the arbitration fee.

The Committee may insist that the trial shall take place without postponement.

Sec. 26. Every case passed upon by a Committee on Arbitration (except where otherwise provided), when the amount at issue or claimed as damages, is $100.00 or more, shall be taxed with a fee of $15.00 to be paid, by the losing party, $5.00 to be retained by the Board of Trade and $10.00 to be distributed equally to the members of the Committee who arbitrated the case. When the amount at issue or claimed as damages is less than $100.00 the arbitration fee shall be $5.00, which fee shall be retained by the Board of Trade.

Arbitration fees must be deposited in advance with the Secretary by the party bringing the case, and in the event of the case being decided in his favor the deposit is to be returned.

The fees of the Committee on Appeal, not specifically provided for, shall be the same as the fees in same cases before the Committee on Arbitration from whose decision the appeal was taken, and they shall be paid and disposed of in the same manner.

Fees and all additional costs that may be incurred in the investigation of suits shall be finally paid by either of the parties in the case, as may be decided by the Committee hearing the same, and shall be included in their awards or findings.

The Committees on Arbitration, as well as the Committees on Appeals, shall each render their awards or findings in writing, through the Secretary of the Exchange, within one business day after their decision shall have been made. Such awards or findings shall be signed by the Chairman of the Committee and shall be certified by the Secretary, under the seal of the Exchange. The official record and decisions of these Committees may be inspected by any member of the Exchange upon application to the Secretary, with the consent of the President, his refusal to be subject to appeal to the Executive Committee.

Sec. 27. Before entering upon the duties of their offices, the members of every Committee on Arbitration, and every Committee on Appeal shall be required to take or subscribe before a duly authorized official of the Exchange to the following oath or affirmation, viz.:

"You do solemnly swear (or affirm) that you respectively will faithfully and fairly hear and examine all matters of controversy which may come before you during your tenure of office, and that you will in all cases make just and equitable awards or findings upon the same, and in conformity with the Rules, Regulations, and By-Laws of the Association, and according to the evidence, to the best of your understanding; so help you God."

SAN FRANCISCO CHAMBER OF COMMERCE.

The San Francisco Chamber of Commerce has a standing arbitration committee consisting of seven members, three of whom constitute a quorum. The Board of Directors of the Chamber may, from time to time, as occasion may require, elect alternate members of the Arbitration Committee, who shall be members of the Chamber having a practical knowledge of the quality, grade or value of any special commodity. When a controversy is submitted for arbitration and the question at issue relates to the quality, grade or value of a certain commodity of which, in the opinion of the Chairman, the members of the Arbitration Committee, or a sufficient number thereof, have not the requisite practical knowledge, he, said Chairman, subject to the approval of the parties to the controversy, may designate one or more, but not exceeding three in number, of the Alternate Members of said Committee, to serve on the Arbitration Committee in the case in question. The status of said Alternate Members during said case shall be that of the regular members with the same right to vote on the questions at issue and to receive the same arbitration fees.

As soon as practicable after their election, the Arbitration Committee shall elect a chairman from their own body. They shall be entitled to the services of the Secretary of the Chamber to act as clerk of the committee. But if from any cause he is unable or does not act, the committee may appoint a clerk pro tem. The proceedings of said committee shall be recorded in a book to be kept for that purpose, in which shall be entered a summary of each controversy had before them, the award made thereon, and at the discretion of the committee, the grounds for such award. Said book shall be the property of the Chamber, and subject to the inspection of its members.

The by-laws of the San Francisco Chamber of Commerce provide:

Sec 3. Members of the Chamber who may desire the services of said Committee shall file with the Secretary an agreement, in writing, to submit their case to the Committee, and be bound by their decision, subject to the right of appeal, which agreement shall be signed by the parties thereto, and attested by a subscribing witness. On such an agreement being signed, the Secretary shall call a meeting of the Committee, to be held as soon thereafter as may be convenient to the parties concerned, to hear and decide such controversy. If, in any case submitted to the Committee, for want of evidence or other causes, it may conclude it is out of its power to render substantial justice, it has authority to dismiss such case. In all cases the Committee shall exercise its discretion in the matter of holding and postponing its sessions, dismissing or continuing cases, rendering or deferring judgments, and may so exercise its powers generally as to promote substantial justice.

Should application for arbitration with a member of the Chamber be made by a non-member, the Arbitration Committee may hold such arbitration, provided assent thereto is given by the member in question.

Sec. 4. The fees for an arbitration shall be: Where the amount in controversy is under $1,000—$25. Where the amount is from $1,000 to $2,000—$35. Where the amount is from $2,000 to $3,000—$45. Where the amount is over $3,000—$50. The fees as above shall be deposited with the Secretary in advance by each of the parties to the arbitration and shall be equally divided among the members sitting on the case and clerk of the Committee. The Committee shall decide by which party to the case the fees shall be paid, or it may divide the fees at its discretion. All reports and awards of the Arbitration Committee shall be made directly to the Board of Directors, whose duty it shall be to see that such awards are complied with, unless in case of an appeal.

COMMITTEE ON APPEALS

Sec. 1. As herein provided, the Board of Directors, within thirty days after election, shall elect a Committee of Appeals, to consist of five members of the Chamber, not members of the Board of Directors nor of the Arbitration Committee, and they shall hold office until the election of their successors.

Sec. 2. The Committee of Appeals shall organize at the first meeting after their election, by choosing one of their number chairman, and shall be entitled to the services of the Secretary of the Chamber as clerk of the Committee, or, in case he fails to act, they may elect a clerk pro tem.

Sec. 3. A record of their proceedings shall be kept in a book provided for that purpose, in which shall be entered a summary of each controversy had before them, the decision made thereon, and, at the discretion of the Committee, the grounds for such decision. Said book to be the property of the Chamber and subject to the inspection of its members.

Sec. 4. The Committee shall review any decision of the Committee of Arbitration, involving over one hundred dollars in amount, that may be brought before it on appeal, on the written application of the dissatisfied party, within five days after notice of said decision by the Arbitration Committee. The said written application for the services of the Committee of Appeals shall be made through the Secretary of the Chamber, and shall embrace a copy of the original complaint, the decision of the Committee of Arbitration, and substantially the grounds of the exceptions taken thereto by the appealing party.

Sec. 5. The Committee on Appeals may, if they deem it proper, refuse to entertain the appeal or may entertain the same and confirm, modify or reverse the judgment of the Arbitration Committee, and its decision shall be final and binding. It shall report its judgment directly to the Board of Directors, whose duty it shall be to carry it into effect; and in case of refusal to comply with the judgment, the Board shall suspend or expel the recusant member.

In the review on appeal of any decision of the Committee on Arbitration of the Chamber, or of any committee referred to in Section 5½ of this article, if the parties to the appeal, or either of them, offer any new evidence for the consideration of the Committee on Appeals, that Committee shall not in the first instance be authorized to receive or consider such new evidence; but in such a case it may, in its discretion, refer the matter in arbitration to the Arbitration Committee of the Chamber, or to the committee referred to in Section 5½ of this article, as the case may be, for rehearing and reconsideration in connection with such new evidence offered. And if by reason of any rule or regulation

of any subordinate board or organization of the Chamber, the duly authorized committee thereof, referred to in Section 5½ of this article, shall be without jurisdiction to rehear or reconsider said matter in arbitration in connection with such new evidence offered, then the Committee on Appeals may continue to entertain such appeal and on the hearing thereof it may, in its discretion, receive and consider such new evidence. The provisions of this section shall apply to all appeals taken under authority of these By-Laws.

Consideration of new evidence by the Committee on Appeals, directly or by reference to another committee, as aforesaid, shall be granted only in exceptional cases and where the consideration of such new evidence, in the opinion of the Committee on Appeals, is necessary to prevent or avoid a miscarriage of justice between the parties to the appeal.

Sec. 5½. The Committee on Appeals shall also review the decisions of any duly authorized committee of the subordinate boards or organizations of the Chamber formed under Section I of Article IX of these By-Laws, when brought to its attention in the manner prescribed by the rules and regulations of such subordinate boards or organizations, and upon such review the rules of procedure herein prescribed shall govern.

Sec. 6. Each member of the Committee of Appeals, who shall be present at a hearing of any case, shall be entitled to a fee of $5 for each sitting, to be paid, together with such fee as the Committee may award the clerk, by the party against whom the decision shall be rendered, except in such cases as the Committee at its discretion shall otherwise order. Before entertaining an appeal the Committee shall require the probable amount of fees to be deposited with the Secretary of the Chamber.

METHOD OF PROCEDURE

The following is given for information of parties desiring to submit questions for arbitration to the San Francisco Chamber of Commerce:

ARBITRATION

1. The Chamber's regular form of Arbitration Agreement must be signed by both parties and witnessed and be deposited with the Secretary.

2. Each party must deposit in advance the full amount of the arbitration fees, $25.00 to $50.00, as specified in Section 4, of the Rules. Any necessary expenses incurred by the Committee for analysis, cables, etc., shall also be paid by the party or parties against whom they are assessed.

3. The party making claim will send to the Secretary, addressed to the Arbitration Committee, six copies of his written statement of facts, together with the original or copy of the contract and of any other documents bearing upon the issue.

4. A copy of said statement will be furnished by the Secretary to the other party, who will file as soon as possible six copies of his reply and a copy or original of any other documents he wishes to submit.

5. Unless both parties can be present at the hearing it will be understood that the case is submitted upon written documents and other evidence furnished. Neither party can be represented at any hearing by legal counsel, but must appear in person or by authorized representative if appearing at all. In case of arbitrations on quality to be decided upon sample submitted, appearance of parties is not necessary unless requested.

6. A certified copy of the award will be furnished each party and any balance due from fees deposited will be refunded.

APPEAL

1. If any case is appealed, notice thereof must be received by the Secretary not later than five days, Sundays and holidays excepted, after notice of the award has been delivered to appellant or at his place of business.

2. Appellant will send with said notice, six copies of a statement giving the grounds upon which he appeals and a similar number of copies of the arbitration award. These may be thin carbon copies. He will also deposit in advance the estimated minimum fees for one sitting, $30.00.

3. The other party will be furnished with a copy of appellant's statement and will furnish six copies of his reply, if he desires to reply.

4. Neither party will appear at the meeting of the Committee on Appeals unless requested by the Committee to do so, or upon special request of the parties.

5. A certified copy of the Committee's decision will be furnished to each party.

6. The decision of the Committee on Appeals is final and is to be complied with immediately after it is received by the parties, or as soon thereafter as it is practicable to comply.

7. If more than one sitting of the Committee is necessary, such additional fees as are assessed by the Committee, shall be paid, as provided in the decision. Any necessary expenses incurred by the Committee shall also be paid by the parties at interest as assessed by the Committee.

INTERSTATE COTTONSEED CRUSHERS' ASSOCIATION.

The Interstate Cottonseed Crushers' Association by-laws provide for Committees on Arbitration consisting of five members each at the following named cities:

Houston and Dallas, Texas; New Orleans, La.; Memphis, Tenn.; Atlanta, Ga.; New York City, and "such other points as may be designated by the Executive Committee." The several chairmen of these various permanent Arbitration Committees constitute the Committee on Appeal. The Committee on Appeals shall examine all cases arising from decisions of any of the Arbitration Committees between members of the Association. Awards on Appeals shall be based upon the evidence submitted to the Arbitration Committees, and shall be final.

The rules of Arbitration are as follows:

CHAPTER XV. ARBITRATION

RULE 290. Agreement to Arbitrate. In case any dispute with reference to any contract for the purchase and/or sale of any commodities covered by these Rules arises between members of this Association, which the parties are unable to adjust between themselves, such dispute shall, upon demand of either party thereto, be settled by arbitration before an Arbitration Committee of this Association, and every member of this Association by becoming such has agreed to such arbitration, and has further agreed and obligated himself to abide by and perform any final award made under these Rules, by any regular Arbitration Committee or Committees of Appeals of this Association, whether such arbitration be held ex parte or on agreements duly signed by both parties as herein provided. Both parties to the dispute will sign on the standard form of this Association an agreement referring to the contract or subject out of which the dispute has arisen, and agreeing to abide by and perform the award of the Committee. The Committee of this Association to which the dispute is referred will have jurisdiction to determine under and in accordance with these Rules the entire controversy between the parties

arising out of the transaction referred to by the agreement as the origin of the dispute. When a controversy is submitted to a Committee of this Association for determination, it will be the duty of such Committee to determine such controversy, being guided in making an award by the Rules of this Association as written.

RULE 291. Standard Form of Agreement for Arbitration. The Standard Form of Agreement for Arbitration is as follows:

This Article of Agreement, made and entered into this the..................day of.., A. D. 19 ....

WITNESSETH:

That, whereas, differences and controversies are now existing and pending between..

and

....

in relation to..

....

....

Now, therefore, we, the undersigned, do hereby mutually agree to submit the entire controversy arising out of said transaction to the arbitration and decision of an Arbitration Committee of the Interstate Cotton Seed Crushers Association, or a quorum of them, with the right of appeal on the part of either of us to the Appeals Committee, according to the rules and regulations of said Interstate Cotton Seed Crushers Association, and we do further authorize and empower the said Arbitration Committee, or a quorum of them, to arbitrate, award, adjust and determine the differences now existing between us in the aforesaid matter.

And we do further covenant and agree that the award to be made as aforesaid, by the said Committee on Arbitration, or in the case of appeal by said Appeals Committee, shall in all things by us and each of us respectively be well and faithfully performed; that we will stand to, abide by, and fulfill the same, and that we will pay whatever sum of money may be awarded as aforesaid:

And further, that we will abide by all the rules and regulations of said Interstate Cotton Seed Crushers Association in relation to arbitration, and herewith deposit with the Secretary of the Association, as required, the sum of ....to cover the cost of this arbitration.

And we do further agree that the awards of the arbitrators, as aforesaid, whether made by the Arbitration Committee or the Appeals Committee, if made in writing and signed by the arbitrators, and attested by the Secretary of the Interstate Cotton Seed Crushers Association, may be entered on the records of the court of jurisdiction in the State and county in which we reside, and that judgment may be had thereon in accordance with the terms thereof.

And we do further agree that whatever samples, if any, which may be submitted by either party to the controversy for examination may be destroyed or otherwise disposed of at the end of thirty days after the hearing of this case, if not otherwise instructed.

RULE 292. Powers and Duties of the Secretary. Where the contract does not specify and parties are unable to agree upon the Committee to hear the dispute, the Secretary shall select the Committee to which the dispute will be referred. The Secretary will procure from each party to the arbitration an agreement in writing, on the standard form of the Association, binding such parties to abide the decision of the Arbitration Committee, and in case of appeal, of the Appeals Committee, and to pay promptly the amount of the award against him. The Secretary will collect the required deposits and disburse the fees and expenses allowed hereunder. The Secretary will call meetings of the various Arbitration Committees and of the Appeals Committees when necessary, and receive all papers filed in connection with arbitrations hereunder, transmit same to the proper Committees, and issue such notices as may be required by these Rules. All briefs filed with respect to any arbitration hereunder must be filed in duplicate, and the Secretary, as soon as such briefs are filed, will furnish a copy thereof to the opposite party. The Secretary will furnish either side, when so requested, certified copies of any and all papers filed in connection with any arbitration already held, the expense of making the copies to be paid by the party requesting the same. All notices to be given by the Secretary hereunder, unless otherwise specified, and all briefs to be sent by him will be sent by registered mail, return receipt requested, in order that the records of the Secretary of the Association shall show the time of receipt of such notices and briefs by the party to whom the same are addressed.

RULE 293. Appearance and Evidence Before Arbitration and Appeals Committees. No personal appearance or parol evidence will be permitted before the Arbitration Committee or the Appeals

Committee except upon the consent of the Chairman of the Committee, but where one party is permitted to appear or offer parol evidence, the other shall have the same right. Evidence before the Committee, except as just provided, will consist of written documents (including letters and telegrams) and ex parte affidavits. When such personal appearance is permitted, it may be in person or by attorney. The practice heretofore followed of requiring the attendance of one or more members of the Arbitration Committee before the Appeals Committee is abolished. The Arbitration Committee may, however, in making its award, set down in writing the reasons for such award. A copy of such written opinion of the Arbitration Committee will be furnished to all parties to the controversy, and a copy thereof will be filed with the papers, and sent up to the Appeals Committee as a part of the record in the case.

RULE 294. Chemists. In all controversies in which a chemical analysis is required, the Chairman of the Arbitration Committee to which the case is referred will name the chemist who will make such analysis. Where samples are submitted to a chemist for analysis, such chemist shall not give out any information to either contestant or other person as to his analysis. The report of his investigation must be made to the Arbitration Committee alone. Any violation of this rule will subject the chemist so offending to expulsion from the Association by a majority vote of the Executive Committee. The chemist to whom samples are submitted shall promptly analyze the same and report his findings.

RULE 295. Classers in Linter Arbitrations. In Linter Arbitrations where grades are involved and an agreed classer has not been named by the contestants, the Chairman of the Arbitration Committee before whom the case is heard may name the classer, who shall be a disinterested party.

RULE 296. Procedure in Arbitration. For convenience, the party or parties demanding the arbitration will in these Rules and in arbitration proceedings hereunder, be referred to as complainant or complainants and the party or parties against whom an arbitration is demanded will be referred to as defendant or defendants. Demands for arbitration will be made by complainant by letter or telegram addressed to the Secretary of the Association. When an arbitration has been demanded, it will be the duty of the complainant to promptly file with the Secretary of the Association five copies of his agreement to arbitrate on the standard form of the Association. Such agreement must state the names of the parties to the dispute, and make reference

to the contract out of which the dispute arises. With such agreement to arbitrate complainant must file his brief and evidence. As soon as such agreement, brief and evidence are filed, together with deposit to cover probable costs, the Secretary of the Association will forward to defendant the five copies of the complainant's agreement to arbitrate, together with a copy of the complainant's brief. Defendant must, within five days after he has received the papers referred to above, file with the Secretary of the Association two copies of the agreement to arbitrate, properly signed, retaining the third copy for his file, and within twenty days, brief and evidence. As soon as such papers are filed with the Secretary, he will furnish to the complainant a copy of the fully executed agreement for arbitration, and a copy of the defendant's brief. The case will be ready for submission to the Arbitration Committee ten days after complainant has received a copy of defendant's brief. Within such ten-day period complainant may file such reply brief and additional evidence as he may desire and the Secretary will immediately furnish defendant a copy thereof. For good cause shown, the President of the Association may, on written or telegraphic request made in advance and stating the necessity therefor, enlarge the time for filing the briefs and evidence as above specified, but in no case shall the time of the defendant for answering be enlarged for a period of more than twenty days additional time, and in no case shall the time of the complainant for filing reply be enlarged more than ten days additional time. The evidence may be submitted in the form of samples of the commodities involved, letters, telegrams or other documents, and ex parte affidavits. Letters, telegrams and other documents submitted must be either originals or copies. If copies are furnished, proof must be made by the affidavit of a credible person that such copies are true and correct copies of the originals. In any case, however, where copies are used, the Arbitration Committee will have the right to demand the originals and the Committee shall further have the right to require the production of any additional documentary evidence or other evidence in the possession of the parties to the controversy, and which the Committee thinks necessary to enable it to give the case intelligent and proper consideration. A refusal on the part of the complainant to submit such additional evidence will authorize the Arbitration Committee in its discretion to dismiss the complaint, and refusal on the part of the defendant to submit such additional evidence will authorize the Committee in its discretion to render an award against him as by default.

RULE 297. Re-hearing Before Arbitration Committee. Any party to an arbitration who is dissatisfied with the award of the

Committee may have the cause re-heard by the Committee, provided such party within ten days after receipt of notice of the award, but not later, files with the Secretary of the Association his written or telegraphic notice, stating that he does apply for a re-hearing of the controversy. Within twenty days after applicant for re-hearing has received notice of the award, he must file with the Secretary of the Association such additional evidence and brief as he may desire to present to the Committee. The brief will be filed in duplicate, and the adverse party promptly furnished with a copy thereof. Within ten days after such copy of the brief has been received by the adverse party, he may file such reply brief as he desires. At the end of such ten-day period the case will be ready for re-submission to the Arbitration Committee.

RULE 298. Appeal to the Appeals Committee. In all cases where the amount in controversy is Three Hundred Dollars, or more, an appeal may be had to the Appeals Committee by any party to the Arbitration who is dissatisfied with the award, provided such party within ten days, and not later, after he receives notice of the award of the Arbitration Committee, files with the Secretary, by letter or telegram, notice of his intention to appeal. Within twenty days after receipt of notice of the award the party appealing must, if a money award has been made against him, deposit with the Secretary the full amount of such award, and file his brief in support of his appeal. Briefs will be filed in duplicate, and promptly upon receipt of the same the Secretary will furnish the adverse party with a copy thereof. Such adverse party will file his reply brief within ten days after receipt of appellant's brief, and thereafter the case will be ready for final submission to the Appeals Committee. Neither party will be permitted to introduce any additional evidence before the Appeals Committee, but the case will be decided on the evidence presented to the Arbitration Committee. It is not essential to the right of appeal that application for a re-hearing before the Arbitration Committee be filed. The time for filing notice of appeal will run from the date appellant receives notice of the final award of the Arbitration Committee. The Appeals Committee will affirm, reverse and remand, or reform the award of the Arbitration Committee.

RULE 299. Ex Parte Arbitration. If any member of the Association fails or refuses to submit to arbitration any dispute or controversy he may have with another member of the Association, on the demand of such member, or, if any member against whom arbitration has been demanded should, for five days after receipt of telegraphic

notice from the Secretary to proceed with the arbitration, fail so to do, the Chairman of a Permanent Committee on Arbitration, upon receipt of such complaint, will proceed at once to satisfy himself as to the facts, and, upon a finding that such party is negligently or willfully delaying the arbitration, he will so notify the defendant by telegram collect, and the Committee will proceed with the arbitration ex parte, and the decision so rendered will, so far as the Association is concerned, be binding on all parties involved therein. Any papers filed by defendant with the Secretary before the case is heard may be considered by the Committee. The complainant will pay cost of such arbitration, but the Committee will, if the award is in complainant's favor, add the amount of such cost to the award.

RULE 300. Penalty for Refusal to Arbitrate or Comply with Award. If any member of this Association shall refuse to carry out the final award of the Arbitration or Appeals Committee, as the case may be, the other party or parties to the arbitration may report the matter to the Chairman of the Permanent Committee on Arbitration, who shall at once investigate the correctness of the complaint, and, if the complaint is substantiated, he shall at once notify the President of the Association, who will immediately, through the Secretary, demand of the party in default full compliance with the requirements of these Rules, and the award of the Committee, within five days after the receipt of such notice. If the member fails or refuses to comply with such official demand, he shall be immediately expelled from the Association, and the President over his signature, countersigned by the Secretary, shall so notify him, and at the same time and in the same manner, a circular letter shall be sent to every member of the Association notifying him that such member has been expelled from the Association for refusal to abide by the award of an Arbitration or Appeals Committee. Any member so expelled shall not again become a member of this Association until he shall have paid and satisfied in full the award against him, and then only upon majority vote of the Executive Committee. No person, firm or corporation that has been expelled from the Texas or other State Cotton Seed Crushers' Association shall be eligible to membership in this Association until he or it shall have satisfied the demands against him or it, and had his or its membership therein restored, and such expulsion ipso facto forfeits membership already had in this Association. If at any time the Secretary of any such State Association shall certify to the President of this Association that any member of this Association has been expelled from such Association, the President and Secretary will issue prompt notice of the fact to all members of this Association.

RULE 301. Deposits, Costs and Fees. Any member of this Association by or against whom an arbitration or application for rehearing is demanded, shall, when the demand is made or agreed to, as the case may be, deposit with the Secretary of the Association, bank draft for the sum of $50.00. Any party by or against whom an appeal to the Appeals Committee is demanded, shall at the time of the demand, deposit with the Secretary of the Association, the sum of $250.00. The deposits so made will be held by the Secretary until the decision in the case becomes final, when the deposit of the ultimate loser will be used to pay the costs awarded against him. The following fees shall be taxed as costs in every arbitration, rehearing or appeal:

To the Association for each original arbitration	$ 10.00
To be divided equally among Committeemen serving on each original arbitration	35.00
To the Chairman of the Arbitration Committee, in addition to his pro rata part of the Committee fee, for each original arbitration	5.00
To the Association for each rehearing	10.00
To be divided equally among Committeemen serving on each rehearing	35.00
To the Chairman of the Arbitration Committee, in addition to his pro rata part of the Committee fee, for each rehearing	5.00
To the Association for each appeal	10.00
To each member of the Appeals Committee for each appeal	10.00
To the Chairman of the Appeals Committee for each appeal	15.00
To each chemist for each official analysis	
For each ex parte opinion of the Arbitration Committee as to quality	25.00

In addition to the above fees, every member of the Association serving on any one of the above committees will have refunded to him the actual expense incurred by him by reason of his attendance at the meeting of the committee, such expense to be taxed as costs. Where a Committee decides more than one case at a given session, the expense of the Committeemen will be prorated equally to the cases heard at such session, so that each Committeeman will be allowed to collect only once the expenses incurred by him in attending such sitting of the Committee. The entire cost of the arbitration will be assessed against and paid by the final loser in the arbitration, provided, however, if the party against whom an award is made satisfies the Committee that he had tendered an offer of compromise which had been rejected, and that such tender was renewed before the Committee, the cost will

be assessed against the party in whose favor the award is made, unless the award made is in excess of the compromise offered. When the controversy is finally determined the Secretary of the Association will, out of the deposits made by the party against whom the costs are assessed pay all fees and costs of arbitration, and will return to the other party the deposit made by him. If the deposit is insufficient to pay the costs assessed, the party against whom such costs are assessed shall immediately pay the difference to the Secretary of the Association.

RULE 302. Notice of Claims and Resignations Pending Arbitrations. Members of the Association should notify the Secretary of any differences had or likely to arise in order that he may forestall the resignation of any member against whom a complaint is about to be made. No member of this Association against whom an arbitration has been or is about to be demanded or against whom a complaint of any nature is made, shall be allowed to resign until all matters in question are settled.

RULE 303. Arbitration Between Members and Non-Members. When an arbitration is demanded by or against a non-member, and the non-member consents in writing and deposits with the Secretary of the Association the usual fees required in such cases and pays into the treasury of the Association for its use and benefit an additional fee of $100.00, the dispute will be arbitrated in the manner hereinabove set out, with reference to disputes between members.

RULE 304. Arbitration Before a Permanent Committee of Arbitration Without Referring the Papers to Secretary. At points where Permanent Arbitration Committees of this Association are located, such Committees may, if they so desire, undertake arbitration under these Rules, delegating one member of the Committee to perform the clerical work and correspondence involved, without referring the papers to the Secretary of the Association, but in such cases the Committee is responsible for and must promptly remit to the Secretary the Association fee, together with the papers and final decision, for file and record. After this is done in all arbitration cases, correspondence concerning the decision on the part of the principals in the case shall be addressed to the Secretary of the Association. The procedure in such case will be the same as in other cases.

RULE 305. Claims Arising Before One or Both of the Disputants Become Members of the Association. Where a member demands an arbitration against another member, and it appears that the claim grew out of a transaction had between them when one or both

of them were not members of the Association, no Arbitration Committee of this Association will have jurisdiction to hear the case unless both parties agree that it may do so.

RULE 306. Ex Parte Opinion of the Arbitration Committee as to Quality of Products. Any member of the Association may, upon payment of the prescribed fee, take the opinion of the Arbitration Committee as to the quality of any product, and likewise as to the money value of any difference between such quality and the quality called for by a given contract, whether such contract be between members or between a member and a non-member.

RULE 307. Appointment and designation of Arbitration and Appeals Committees. Permanent Arbitration Committees will be appointed by the President to sit at New York, Memphis, Atlanta, New Orleans, Chicago, Dallas, Houston, Montgomery, Little Rock, Jackson, Miss., and Oklahoma City, and other points where application is made by not less than ten members of the Association, provided the President thinks it wise to appoint a Committee at the place requested. Such appointments will be made as soon as convenient after the President is elected. A Permanent Arbitration Committee will consist of five members, any three of whom will constitute a quorum for the transaction of business. Each Committee will meet upon the call of the Secretary as often as is necessary for the prompt dispatch of business. The President shall designate five members of the Appeals Committee to serve on appealed cases, naming the chairman and the place for hearing each case. The members so selected will be those available who happen to be most convenient to the point of the original arbitration. The chairman of the Arbitration Committee which passed on the case originally will be excluded.

DRIED FRUIT ASSOCIATION OF CALIFORNIA, DRIED FRUIT ASSOCIATION OF NEW YORK, DRIED FRUIT ASSOCIATION OF CHICAGO, DRIED FRUIT ASSOCIATION OF ST. LOUIS, NATIONAL CANNED FOODS AND DRIED FRUITS BROKERS' ASSOCIATION, NATIONAL CANNERS ASSOCIATION, NATIONAL WHOLESALE GROCERS' ASSOCIATION.

The foregoing organizations operate under rules of arbitration jointly agreed upon, boards of arbitration being located at various designated cities hereinafter set forth. These joint rules have been in effect since 1913 and have been uniformly successful. Litigation in these allied branches of business has been lessened materially and as a

rule prompt decision is rendered by the association or board to which submission of a dispute is made.

The rules are as follows:

1. These Rules of Arbitration shall be known and designated as the "National Dried Fruit Rules of Arbitration."

2. Where in any contract arbitration is provided for under these rules and is applied for by either party to the contract, such arbitration shall, in the absence of mutual agreement to the contrary, be held at the city designated herein situated in closest proximity or most convenient to the destination of shipment, and such arbitration must be held at one of the following named cities, to-wit: Baltimore, Boston, Buffalo, Chicago, Cincinnati, Cleveland, Denver, Detroit, Indianapolis, Kansas City, Los Angeles, the Twin Cities (Minneapolis and St. Paul), New York, New Orleans, Oklahoma City, Omaha, Peoria, Philadelphia, Portland, Pittsburgh, Richmond, San Francisco, Seattle, St. Louis, Toledo.

3. All communications relative to arbitrations shall be addressed to the Secretary of the Association before whom the arbitration is to be held if in New York, Chicago, St. Louis or San Francisco, and to the Chairman of the Joint Arbitration Board appointed by the National Wholesale Grocers' Association and the National Canned Foods and Dried Fruit Brokers' Association in the cities of New Orleans, Denver, Seattle, the Twin Cities (Minneapolis and St. Paul), Kansas City, Omaha, Boston or Philadelphia.

4. All arbitrations shall be held at some regular designated place in such city. The names and addresses of the various Secretaries and presiding officers shall appear upon or accompany all copies of these Rules of Arbitration.

5. All arbitration boards or committees shall be made up of a sufficient number of individuals so that in case of absence or inability to serve, on the part of a member or members, or direct or indirect interest in the controversy which shall disqualify there will be at least two additional members who may be called upon to act.

6. Three (3) arbitrators shall serve in all cases and the agreed decision of any two (2) shall be binding on all parties. The dissenting arbitrator shall, however, sign the findings (as dissenting thereto) and may give his reasons therefor.

7. The following shall be the form of request for arbitration:

...................................., 19..........

To..

....

The undersigned requests that arbitration be held on .... as between .... of .... and .... of .... based upon the condition of a contract of sale providing for arbitration under the National Dried Fruit Rules of Arbitration and hereby agrees to absolutely abide by the award and findings of the Arbitrators, and in the event of adverse decision, to make prompt settlement, paying the fees and costs as provided for in said Rules of Arbitration.

....

By..

8. A written statement of facts and anything else that may have relevant bearing on the case, together with written argument thereon may be presented to the Secretary of the Association or Chairman of the Arbitration Board as the case may be, and shall by him be submitted in its entirety to the arbitrators, but no oral presentation shall be made unless the parties agree thereto, or same is requested by the arbitrators.

9. Findings in all arbitrations shall be in conformity with the provisions of the Uniform Dried Fruit contract, as agreed upon and adopted by the National Wholesale Grocers' Association and the Dried Fruit Association of California.

If the dispute involves a question of quality or size, the arbitration shall be held upon agreed samples drawn and forwarded to the Secretary of the Association or the Chairman of the Board before whom the arbitration is held in accordance with the provisions of the contract between the parties.

10. The fee in all cases of arbitration shall be $20.00, which amount shall be deposited by both parties in advance with the Secretary of the Association or the Chairman of the Arbitration Board as the case may be, but the party in whose favor decision is rendered shall be entitled to a return of his deposit when findings are forwarded to him.

11. Out of the fee above provided for, the arbitrators shall receive the sum of $5.00 each for their services and the Association or Board shall retain a like sum of $5.00 to cover incidental expenses.

12. When a buyer claims an allowance only, he shall, pending award and after samples are duly drawn, be entitled to use balance of shipment.

13. The findings and award of the arbitrators shall be in writing signed by the arbitrators, fully setting forth the facts of the case and a copy thereof shall immediately be furnished to all the parties to the dispute. The losing party shall bear any and all expenses connected with the forwarding of samples.

14. Before entering upon the duties of their office, the members of the Committees or Boards of Arbitration shall subscribe to the following oath: "You do severally swear that you respectively will faithfully and fairly hear and examine the matters in controversy which may come before you during your tenure of office and to make a just award therein, according to the best of your understanding; so help you, God."

15. Where arbitration findings are based on samples and decision is against shipper, the samples upon which arbitration was held shall, on immediate request and at his expense, be returned to him for his information.

16. For the guidance of all parties to arbitration it shall be understood that five (5) full business days shall be considered *Immediate Shipment* and ten (10) full business days shall be considered *Prompt Shipment.*

RICE ASSOCIATION OF CALIFORNIA

Section 1. All members of this Association, if called upon by a member, shall submit for arbitration all disputes or matters subject to arbitration that may arise. By unanimous vote the Board of Directors, if called upon, shall have the authority to decide what constitutes an arbitration.

Section 2. In case of any dispute arising between members of this Association, or a member of this Association and a foreign or domestic buyer, or seller, or authorized agent, out of a contract sale or purchase, and such dispute be submitted for arbitration through or by this Association, such arbitration shall be governed by the following rules:

A—All communications relative to arbitrations shall be directed to the "Secretary" of The Rice Association at San Francisco, California.

B—All arbitrations shall be held at the office of said Association at San Francisco, California.

C—An Arbitration Committee, consisting of three disinterested members, shall be appointed by the President of the Association to handle each arbitration.

D—The following shall be added to each request for arbitration to be used by both parties:

"The undersigned having consented that an arbitration be held through the Rice Association and under the rules and regulations of said Association in the matter of.................................... hereby agrees and promises subject to Article XIV, Section 3, to abide absolutely by the award and findings of the arbitrators and in the event of an adverse decision, to make prompt settlement and likewise pay the fee and costs as provided for in the Rules of said Association."

E—A written statement of facts and anything else that may have relevant bearing on the case, together with written argument thereon, may be presented to the Secretary of the Association and shall by him be submitted in its entirety to the principals involved and to the arbitrators, but no personal representative shall appear unless both parties can be present and oral presentation is requested by the arbitrators.

F—Findings in all arbitrations shall be in conformity with the provisions of The Rice Association uniform contracts as agreed upon and adopted by this Association. If the dispute involves a question of quality or grade, the arbitration shall be held upon agreed samples drawn and forwarded to San Francisco in accordance with the provisions of the said contract.

G—Findings on foreign arbitrations shall be passed upon in accordance with the terms of the agreement upon which the sale in question was made.

H—The fee in all cases of arbitration to be paid by the losing party shall be not less than $30.00, the sum to be deposited to the account of the Association, each arbitrator to receive a $5.00 fee for his services.

I—The findings and award of the arbitrators shall be in writing, signed by the arbitrators, and copy thereof shall immediately be furnished to the parties to the dispute. The losing party shall bear any and all expenses connected with the arbitration.

J—If new testimony or facts develop and are presented in writing by either party to the Arbitration Committee within five (5) days after their original decision, case may be re-opened, provided the Arbitration Committee concludes that said new testimony or facts warrant a rehearing.

Section 3. Any member of this Association involved in an arbitration and not satisfied with the decision of the Association Arbitration Committee, may take his dispute up with the Committee on Appeals of the San Francisco Chamber of Commerce, for review, as prescribed in Article XIII, Section 5½, of the Chamber's By-Laws, provided that any change of decision must be concurred in by at least three members of the Appeals Committee and provided that in any case depending upon its decision on the quality of any lot of rice, the decision of the Association Arbitration Committee shall be final and binding without the right of appeal to the Committee on Appeals of the Chamber. All appeals must, however, be made in writing within five days (excepting Sundays and holidays) after a decision is rendered by the Association Arbitration Committee.

CALIFORNIA BEAN DEALERS ASSOCIATION

This association provides for arbitration under the terms of the Uniform California Bean Contract. If the question is one of quality, or quality as well as some other contract provision, the place of arbitration is either Los Angeles or San Francisco, Seller's option; if for any other reason than for quality, arbitration shall be held either in San Francisco or Los Angeles before the Arbitration Board of the California Bean Dealer's Association under its rules, or in New York, Chicago or St. Louis by the Dried Fruit Association of these cities, or New Orleans, before the Committee of the New Orleans Board of Trade, Ltd.

Either party to an arbitration before this association may appeal from an award involving any question other than quality, such appeal being to the board of directors of the California Bean Dealers Association under the rules of said association. No appeal is allowed where the question is one of quality only.

The by-laws of the association provide for arbitration as follows:

ARBITRATION

Article 13, Section 1. Arbitration of any dispute arising out of the Uniform California Bean Contract shall be submitted to this association, and shall be under the jurisdiction of any committee appointed for the time being in accordance with Article 4, Section 6 of these by-laws.

Section 2. All communications relative to arbitration shall be addressed to the California Bean Dealers Association at San Francisco or at Los Angeles.

Section 3. Three (3) arbitrators shall serve on each case and the agreed decision of any two shall be binding on all parties. The dissenting arbitrator shall, however, sign as dissenting thereto and may give reasons therefor.

Section 4. The fee in all cases of arbitration shall be $20.00, which amount shall be deposited with the association by each party at the time of making application for arbitration, but the party in whose favor decision is rendered shall be entitled to the return of his deposit when the Findings and Award are forwarded to him; provided, that the foregoing shall not abridge the right of the arbitrators in exercising their judgment in the assessment of fees to be paid by either or both parties.

Section 5. The following is the form of request for arbitration substantially to be used by parties submitting to arbitration:

> "The undersigned having consented that an arbitration be held through the California Bean Dealers Association, and under the rules and regulations of said association in the matter of..
> hereby agrees and promises absolutely to abide by the award and findings of the arbitrators, and in the event of an adverse decision, to make prompt settlement and likewise pay the fees and costs as required by said association.
>
> Enclosed please find check for $20.00 deposited on account of arbitration fees."
>
> (Signed)..............................

Section 6. Written statements of fact, together with written arguments thereon, must be presented to the association, and it shall be the duty of the secretary to submit the same in their entirety to the arbitrators, but no oral evidence shall be received unless requested by the arbitrators, provided, if one party has the opportunity to be heard in person the absent party shall likewise have the opportunity to be heard.

Section 7. Sample for arbitration shall be drawn and forwarded to the association in accordance with the provisions of the contract covering samples in case of dispute. The expense of such samples may be assessed by the arbitrators in their discretion.

Section 8. The finding and award of the arbitrators shall be in writing, signed by the arbitrators fully setting forth the facts in the case, and a copy thereof shall immediately be furnished the parties to the dispute.

Section 9. When arbitration award is based upon samples, the samples on which arbitration was held shall, on immediate request, be returned to the owner at his expense.

Section 10. A member of the association who refuses to submit to the association any dispute arising out of a Uniform California Bean Dealers Association contract providing for arbitration, or who fails or refuses within a reasonable time to abide by the finding and award of the arbitrators, except in case of an appeal, shall be reported to the board of directors by the secretary and the directors shall have power to act in such manner as the facts warrant, and may suspend or expel such member, reporting such action to the membership. A member charged with a breach of the by-laws shall have the right to be heard on such charge, but no member may appear by legal counsel.

Section 11. An appeal from any finding and award of arbitrators, except in cases involving the question of quality only, from which no appeal is allowed, may be made to the board of directors of the division under whose jurisdiction the original arbitration was held. A director who shall have acted as arbitrator in the matter on appeal shall be ineligible to act with the board while considering the appeal. Notice of such appeal shall be given within three full business days after receipt of official copy of finding and award, and shall be accompanied by a check in the sum of $50.00 when the amount involved is $500.00 or less, and a check in the sum of $100.00 when the amount involved is more than $500.00, which sum shall be retained by the association if decision of original arbitrators is upheld, and returned to the appellant if not upheld. All expenses incurred by the board of directors considering the appeal may, at the board's option, be assessed against the losing party.

Section 12. The arbitrators shall receive for their services from the association such portion of the arbitration fee as the association may provide.

Section 13. This association, having a northern division, with offices at San Francisco, and a southern division, with offices at Los Angeles, it is understood that the provisions of these by-laws providing for arbitration and establishing the method thereof shall be given full force and effect by the respective boards of directors of both said

divisions, and that the respective boards of directors shall give full force and effect to the findings and awards of all arbitrators of the association whether acting under the jurisdiction of the northern division or the southern division, in like manner as if there was only one division and the membership was identical. Immediately upon ratification of this by-law by the respective memberships of the northern and southern divisions of this association, no person, firm or corporation shall be eligible to membership in either division who shall be under suspension or who shall have been expelled by the board of directors of either division. A member of either division who, upon due notice, fails or refuses to submit to the division having jurisdiction under the uniform contract any dispute shall be liable to suspension or expulsion by the directors of the division with which the member so refusing is identified as a member. A member under suspension may be reinstated, or a member once expelled may be readmitted, by a two-thirds vote of the directors present at any meeting of the directors having jurisdiction of the cause in the first instance, provided, that the cause of suspension or expulsion shall have been terminated.

Section 14. When an arbitrator is appointed in accordance with Article 4, Section 6, he shall be obliged to serve unless for good cause shown, and shall not be released from such service without the consent of the officer making the appointment.

Appendix

FORM OF SUBMISSION TO THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK

FORM A.

THE COMMITTEE ON ARBITRATION OF THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK.

and } *Submission.*

A controversy, dispute or matter of difference between the undersigned having arisen and relating to a subject matter the nature of which, briefly stated, is as follows:

We do hereby voluntarily submit the same and all matters concerning the same to...
as Arbitrator, selected by us from the "LIST OF OFFICIAL ARBITRATORS," compiled and established by the Committee on Arbitration of the Chamber of Commerce of the State of New York, for hearing and decision pursuant to the By-Laws of the Chamber of Commerce of the State of New York, and the Rules and Regulations adopted by the Committee on Arbitration of the Chamber of Commerce, and pursuant to Chapter 275 of the Laws of 1920 of the State of New York, and Chapter 72 of Consolidated Laws; and we agree to stand to, abide by and perform the decision, award, order, orders and judgment that may therein and thereupon be made under, pursuant and by virtue of, this submission.

We do further agree that a judgment of the Supreme Court of the State of New York may be entered in any County in the State of New York thereon.

Dated, NEW YORK,................................

....

....

CORPORATION ACKNOWLEDGMENT.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss:*

On this..............................day of...................................., 19...., before me personally came and appeared..to me known and known to me to be the person who executed the foregoing instrument, who, being duly sworn, did depose and say that he is the...of the above named corporation and that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that he was duly authorized to sign and seal the said instrument in behalf of the said corporation by the authority of the said Board of Directors and said...acknowledged said instrument to be the free act and deed of said corporation.
Subscribed and Sworn to before me
this............day of..........................., 19....

....
(Name of Officer signing.)

Seal Notary Public.

....

ACKNOWLEDGMENT BY PARTNERSHIP.

State of New York, }
County of New York, } ss:

On this..............................day of.................................., 19...., before me personally came and appeared............ ....to me known and known to me to be the person who executed the above instrument, who, being duly sworn by me, did for himself depose and say that he is a member of the firm of..................................... consisting of himself and..and that he executed the foregoing instrument in the firm name of.. and that he had authority to sign same, and he did duly acknowledge to me that he executed the same as the act and deed of said firm of... for the uses and purposes mentioned therein.
Subscribed and Sworn to before me
this...........day of......................., 19.....

....
(Name of signing Member of Firm.)
Notary Public.

Seal ....

INDIVIDUAL ACKNOWLEDGMENT.

State of New York, }
County of New York, } ss:

On this...............................day of...................................., 19...., before me personally came and appeared..to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

Seal ....
Notary Public.

FORM B.

The Committee on Arbitration of the Chamber of Commerce of the State of New York,

and } *Submission.*

A controversy, dispute or matter of difference between the undersigned having arisen and relating to a subject matter the nature of which, briefly stated, is as follows:

We do hereby voluntarily submit the same and all matters concerning the same to...and..who shall select a third arbitrator from the "List of Official Arbitrators." compiled and established by the Committee on Arbitration of the Chamber of Commerce of the State of New York, for hearing and decision pursuant to the By-laws of the Chamber of Commerce of the State of New York, and the Rules and Regulations adopted by the Committee on Arbitration of the Chamber of Commerce, and pursuant to Chapter 275 of the Laws of 1920 of the State of New York, and Chapter 72 of the Consolidated Laws: and we agree to stand to, abide by and perform the decision, award, order, orders and judgment that may therein and thereupon be made under, pursuant and by virtue of, this submission.

We do further agree that a judgment of the Supreme Court of the State of New York may be entered in any County in the State of New York thereon.

Dated, New York.............................. ....

....

....

CORPORATION ACKNOWLEDGMENT.

STATE OF NEW YORK }
}ss:
COUNTY OF NEW YORK, }

On this................................day of................................, 19...., before me personally came and appeared..to me known and known to me to be the person who executed the foregoing instrument, who, being duly sworn, did depose and say that he is the..of the above named corporation and that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that he was duly authorized to sign and seal the said instrument in behalf of the said corporation by the authority of the said Board of Directors and said...
acknowledged said instrument to be the free act and deed of said corporation.
Subscribed and Sworn to before me

this............day of........................, 19......

....
(Name of Officer Signing.)

Seal Notary Public.

....

ACKNOWLEDGMENT BY PARTNERSHIP.

STATE OF NEW YORK, }
}ss:
COUNTY OF NEW YORK, }

On this................................day of..19...., before me personally came and appeared..to me known and known to me to be the person who executed the above instrument, who, being duly sworn by me, did for himself depose and say that he is a member of the firm of.......................................
consisting of himself and...and that he executed the foregoing instrument in the firm name of...
and that he had authority to sign same, and he did duly acknowledge to me that he executed the same as the act and deed of said firm of...
for the uses and purposes mentioned therein.
Subscribed and Sworn to before me

this............day of........................, 19......

....
(Name of signing Member of Firm.)

Seal Notary Public.

....

INDIVIDUAL ACKNOWLEDGMENT.

STATE OF NEW YORK, }
}ss:
COUNTY OF NEW YORK, }

On this................................day of.......................... ....19...., before me personally came and appeared..to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

....

Seal Notary Public.

NEW YORK PRODUCE EXCHANGE

AN AGREEMENT.

TO SUBMIT TO, AND ABIDE BY, THE DECISION OF THE ARBITRATION COMMITTEE OF THE NEW YORK PRODUCE EXCHANGE.

We, the undersigned, members of the New York Produce Exchange, hereby agree to submit, and do voluntarily submit to the Arbitration Committee of the New York Produce Exchange for their consideration and adjudication:

....
....
....
....
....
....

and we hereby bind ourselves, heirs, executors, or assigns, to abide by such decision as the said Committee may render; and in the event of a failure to comply with such decision by either, we hereby authorize and empower the said Committee to assess, and award the damages arising therefrom; and we hereby further bind ourselves, heirs, executors, or assigns to abide by such assessment and award as the said Committee may render, and agree that a judgment of the Supreme Court be rendered upon the award made pursuant to this submission.

Signed in the presence of ....
....
....
....

NEW YORK,.................................19....

CORPORATION ACKNOWLEDGMENT.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } *ss:*

On the..............................day of......................................19...., before me personally came...to me known, who, being by me duly sworn did depose and say, that he resided in..; that he is the...............................of.....................................the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of...of the said corporation, and that he signed his name thereto by like order.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } *ss:*

On the..............................day of......................................19...., before me personally came...to me known, who, being by me duly sworn did depose and say, that he resided in..; that he is the...............................of.....................................the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of...of the said corporation, and that he signed his name thereto by like order.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } *ss:*

FIRM ACKNOWLEDGMENT.

On this..............................day of......................................19...., before me personally came...to me known and known to me to be a member of the firm of...the firm described in and which executed the foregoing instrument, and said...acknowledged that he executed the foregoing instrument for and on behalf of said firm.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } *ss:*

On this..............................day of......................................19...., before me personally came...to me known and known to me to be a member of the firm of...the firm described in and which executed the foregoing instrument, and said...acknowledged that he executed the foregoing instrument for and on behalf of said firm.

INDIVIDUAL ACKNOWLEDGMENT.

STATE OF NEW YORK, } ss:
COUNTY OF NEW YORK, }

On the..............................day of......................................19...., before me personally came..to me known and known to me to be the same person described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

STATE OF NEW YORK, } ss:
COUNTY OF NEW YORK, }

On the..............................day of......................................19...., before me personally came..to me known and known to me to be the same person described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

AGREEMENT TO SUBMIT TO ARBITRATION.

We, the undersigned, hereby mutually covenant and agree to submit, and hereby do submit to..

....

as Arbitrators, for their adjudication and award, a controversy existing between us relating to..

....

....

....

....

....

And we mutually covenant and promise that the award to be made by said Arbitrators or by a majority of them, shall be well and faithfully kept and observed by us, and by each of us.

And it is hereby further mutually agreed that a judgment of the Supreme Court of the State of New York shall be rendered upon the award made pursuant to this submission.

Witness our hands this..................................day of...19....

Signed in the presence of

....

....

NOTE.—This agreement must be asknowledged before a Notary.
The Arbitrators must be sworn or their oath waived in writing.

CORPORATION ACKNOWLEDGMENT.

STATE OF NEW YORK, } ss:
COUNTY OF NEW YORK, }

On the..............................day of......................................19...., before me personally came..to me known, who, being by me duly sworn did depose and say, that he resided in...; that he is the..of.. the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of.................................... . of the said corporation, and that he signed his name thereto by like order.

STATE OF NEW YORK, } ss:
COUNTY OF NEW YORK, }

On the..............................day of......................................19...., before me personally came..to me known, who, being by me duly

sworn did depose and say, that he resided in ....;
that he is the...............................of...
the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of......................................
of the said corporation, and that he signed his name thereto by like order.

FIRM ACKNOWLEDGMENT.

STATE OF NEW YORK, }
} *ss:*
COUNTY OF NEW YORK, }

On this..............................day of..................................19...., before me personally came...to me known and known to me to be a member of the firm of...the firm described in and which executed the foregoing instrument, and said..
acknowledged that he executed the foregoing instrument for and on behalf of said firm.

STATE OF NEW YORK, }
} *ss:*
COUNTY OF NEW YORK, }

On this..............................day of..................................19...., before me personally came...to me known and known to me to be a member of the firm of...the firm described in and which executed the foregoing instrument, and said..
acknowledged that he executed the foregoing instrument for and on behalf of said firm.

INDIVIDUAL ACKNOWLEDGMENT.

STATE OF NEW YORK, }
} *ss:*
COUNTY OF NEW YORK, }

On the..............................day of..................................19...., before me personally came...to me known and known to me to be the same person described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

STATE OF NEW YORK, }
} *ss:*
COUNTY OF NEW YORK, }

On the..............................day of..................................19...., before me personally came...to me known and known to me to be the same person described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

FOREIGN COMMERCE ASSOCIATION OF THE PACIFIC COAST

SAN FRANCISCO AND SEATTLE

....................................192....

The undersigned hereby requests that an arbitration be held at.......................
....before the Foreign Commerce Association of the Pacific Coast and under the rules of said Association in the matter of
....
and hereby agrees and promises absolutely to abide by the award and findings of the arbitrators, and in the event of an adverse decision, to make prompt settlement and likewise pay the fees and costs as provided for in the Rules of said Association.

Check for $50.00 for deposit on account of said arbitration fee enclosed herewith.

Signed...
By...

CALIFORNIA BEAN DEALERS ASSOCIATION

....192......

The undersigned having consented that an arbitration be held through the CALIFORNIA BEAN DEALER'S ASSOCIATION, and under the rules and regulations of said Association in the matter of..

....

hereby agrees and promises absolutely to abide by the award and findings of the arbitrators, and in the event of an adverse decision, to make prompt settlement and likewise pay the fees and costs as provided for in the Rules and Regulations of said Association.

....

By..

BOARD OF TRADE OF THE CITY OF CHICAGO

Chicago,..19........

Mr. John R. Mauff, Secretary,
Dear Sir:

You are hereby notified that the services of the Committee of Arbitration of the Board of Trade of the City of Chicago are desired to decide a difference between..

and

....

in relation to..

....

....

....

Amount claimed $..

NEW ORLEANS BOARD OF TRADE

New Orleans,..19.......

.... } *Agreement in Arbitration.*

vs.

....

The services of the Committee on Arbitration having been solicited to hear and adjudicate upon a claim presented by the undersigned:

....

against the undersigned..

as set forth in the statement hereto attached, we, the said parties, do hereby bind ourselves to abide, perform and fulfill the final award or finding which shall be made touching the matter submitted, and the rules of the Association governing in such matters, without recourse to any other court or tribunal, and subject only to the right of appeal to the Committee on Appeals of this Board.

....

....

AN ACT

In relation to arbitration, constituting chapter seventy-two of the consolidated laws; repealing Sections 2883, 2884, and 2885 of Chapter 17, title 8, of the Code of Civil Procedure, and amending Section 2382 thereof.

Unanimously passed by the Senate of the State of New York, March 26, 1920; by the Assembly April 14, 1920, and signed by the Governor April 19, 1920.

The People of the State of New York, represented in Senate and Assembly do enact as follows:

CHAPTER 72 OF THE CONSOLIDATED LAWS.

Arbitration Law.

Article 1. Short title (§1).
2. General provisions (§§2-6).
3. Application of certain sections of the code of civil procedure and repeal of certain other provisions thereof (§§7-9).
4. Time of taking effect (§10).

ARTICLE 1.

Short Title.

Section 1. Short title.

Section 1. Short title. This chapter shall be known as the "Arbitration Law."

ARTICLE 2.

General Provisions.

Section 2. Validity of arbitration agreements.
3. Remedy in case of default.
4. Provision in case of failure to name arbitrator or umpire.
5. Stay of proceedings brought in violation of an arbitration agreement or submission.
6. Application to be heard as motions.

§2. Validity of arbitration agreements. A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to title eight of chapter seventeen of the code of civil procedure, shall be valid, enforcible and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§3. Remedy in case of default. A party aggrieved by the failure, neglect or refusal of another to perform under a contract or submission providing for arbitration, described in section two hereof, may petition

the supreme court, or a judge thereof, for an order directing that such arbitration proceed in the manner provided for in such contract or submission. Eight days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for personal service of a summons. The court, or a judge thereof, shall hear the parties, and upon being satisfied that the making of the contract or submission or the failure to comply therewith is not in issue, the court, or the judge thereof, hearing such application, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the contract or submission. If the making of the contract or submission or the default be in issue, the court, or the judge thereof, shall proceed summarily to the trial thereof. If no jury trial be demanded by either party, the court, or the judge thereof, shall hear and determine such issue. Where such an issue is raised, any party may, on or before the return day of the notice of application, demand a jury trial of such issue, and if such demand be made, the court, or the judge thereof, shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action. If the jury find that no written contract providing for arbitration was made or submission entered into, as the case may be, or that there is no default, the proceeding shall be dismissed. If the jury find that a written contract providing for arbitration was made or submission was entered into and there is a default in the performance thereof, the court, or the judge thereof, shall make an order summarily directing the parties to the contract or submission to proceed with the arbitration in accordance with the terms thereof.

§4. Provision in case of failure to name arbitrator or umpire. If, in the contract for arbitration or in the submission, described in section two, provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then, upon application by either party to the controversy, the supreme court, or a judge thereof, shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said contract or submission with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided, the arbitration shall be by a single arbitrator.

§5. Stay of proceedings brought in violation of an arbitration agreement or submission. If any suit or proceeding be brought upon any issue otherwise referable to arbitration under a contract or submission described in section two, the supreme court, or a judge thereof, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under a contract containing a provision for arbitration or under a submission described in section two, shall stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.

§6. Applications to be heard as motions. Any application to the court, or a judge thereof, hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

ARTICLE 3.

Application of Certain Sections of the Code of Civil Procedure and Repeal and Amendment of Certain Other Provisions Thereof.

Section 7. Repeal of provisions of code of civil procedure.
8. Application of certain sections of code of civil procedure.
9. Amendment of certain section of code of civil procedure.

§7. Repeal of provisions of code of civil procedure. Sections twenty-three hundred and eighty-three, twenty-three hundred and eighty-four and twenty-three hundred and eighty-five of chapter seventeen, title eight, of the code of civil procedure are hereby repealed.

§8. Application of certain sections of code of civil procedure. The provisions of sections twenty-three hundred and sixty-five to twenty-three hundred and eighty-six of the code of civil procedure, both inclusive, except sections twenty-three hundred and eighty-three, twenty-three hundred and eighty-four and twenty-three hundred and eighty-five, so far as practicable and consistent with this chapter, shall apply to an arbitration agreement under this chapter, and for such purpose the arbitration agreement shall be deemed a submission to arbitration. Wherever in such sections reference is made to the court specified in the submission, the supreme court shall have jurisdiction of the subject matter if no court be specified in the arbitration agreement.

§9. Amendment of certain section of code of civil procedure. Section twenty-three hundred and eighty-two of the code of civil procedure is hereby amended to read as follows:

§2382. (The death of a party to a submission, made either as prescribed in this title or otherwise, or the appointment of a committee of the person or property of such a party, as prescribed in title sixth of this chapter, operates as a revocation of the submission, if it occurs before the award is filed or delivered but not afterwards.) Where a party dies (afterwards) *after making a submission either as prescribed in this title or otherwise,* if the submission contains a stipulation, authorizing the entry of a judgment upon the award, the award may be confirmed, vacated, modified, or corrected, upon the application of, or upon notice to, his executor or administrator, or a temporary administrator of his estate; or, where it relates to real property, his heir or devisee, who has succeeded to his interest in the real property. Where a committee of the property, or of the person, of a party *to a submission* is appointed, (after the award is filed or delivered,) the award may be confirmed, vacated, modified, or corrected, upon the application of, or notice to, a committee of the property; but not otherwise. In a case specified in this section, a judge of the court may make an order, extending the time within which notice of a motion to vacate, modify, or correct the award must be served. Upon confirming an award, where a party has died since it was filed or delivered, the court must enter judgment in the name of the original party; and the proceedings thereupon are the same, as where a party dies after a verdict.

ARTICLE 4.

Time of Taking Effect.

Section 10. Time of taking effect.

§10. Time of taking effect. This act shall take effect immediately.

American Foreign Trade Definitions

adopted at a conference participated in by the National Foreign Trade Council, Chamber of Commerce of the U. S. A., National Association of Manufacturers, American Manufacturers' Export Association, Philadelphia Commercial Museum, American Exporters' and Importers' Association, Chamber of Commerce of the State of N. Y., N. Y. Produce Exchange, and N. Y. Merchants' Association, held in India House, N. Y., on December 16, 1919.

* * * * * * * * *

As the most certain means of insuring unmistakable clarity in terms and conditions of sale, the Conference voted to recommend to manufacturers and exporters that all use of abbreviated forms of export price quotations be abandoned, and that such terms be written out in full.

The Conference recognized, however, that this recommendation is not likely to be accepted generally at once; and therefore, in the hope of effecting a simplification and standardization of American practice, it adopted the following statement of definitions of the abbreviated forms in more common and general use in the export trade. The Conference strongly recommends to manufacturers and exporters that wherever abbreviated forms of export quotations are employed, the forms herein defined be used, as far as possible, to the exclusion of other forms.

DEFINITIONS OF EXPORT QUOTATIONS

These are, in their order, the normal situations on which an export manufacturer or shipper may desire to quote prices. It is understood that unless a particular railroad is specified, the property will be delivered to the carrier most conveniently located to the shipper. If the buyer, for the purpose of delivery, or in order to obtain lower transportation charges, desires that the goods be delivered to a carrier further removed from the shipper and entailing a greater cost than delivery to the carrier most favorably situated, the carrier to which the buyer desires delivery of the goods should be named in the quotation. The term "cars or lighters" as used herein, is intended to include River, Lake or Coastwise ships, canal boats, barges, or other means of transportation, when so specified in the quotation.

1. When the price quoted applies only at inland shipping point and the seller merely undertakes to load the goods on or in cars or

lighters furnished by the railroad company serving the industry, or most conveniently located to the industry, without other designation as to routing, the proper term is:

"F. O. B. (named point)"

Under this quotation:

A. Seller must

(1) place goods on or in cars or lighters
(2) secure railroad bill of lading
(3) be responsible for loss and/or damage until goods have been placed in or on cars or lighters at forwarding point, and clean bill of lading has been furnished by the railroad company.

B. Buyer must

(1) be responsible for loss and/or damage incurred thereafter
(2) pay all transportation charges including taxes, if any
(3) handle all subsequent movement of the goods.

2. When the seller quotes a price including transportation charges to the port of exportation without assuming responsibility for the goods after obtaining a clean bill of lading at point of origin, the proper term is:

"F. O. B. (named point) *Freight Prepaid to* (named point on the seaboard)"

Under this quotation:

A. Seller must

(1) place goods on or in cars or lighters
(2) secure railroad bill of lading
(3) pay freight to named port
(4) be responsible for loss and/or damage until goods have been placed in or on cars or lighters at forwarding point, and clean bill of lading has been furnished by the railroad company

B. Buyer must

(1) be responsible for loss and/or damage incurred thereafter
(2) handle all subsequent movement of the goods
(3) unload goods from cars
(4) transport goods to vessels
(5) pay all demurrage and/or storage charges
(6) arrange for storage in warehouse or on wharf where necessary

3. Where the seller wishes to quote a price, from which the buyer may deduct the cost of transportation to a given point on the seaboard,

without the seller assuming responsibility for the goods after obtaining a clean bill of lading at point of origin, the proper term is:

"F. O. B. (named point) *Freight Allowed to* (named point on the seaboard)"

Under this quotation:

A. Seller must
- (1) place goods on or in cars or lighters
- (2) secure railroad bill of lading
- (3) be responsible for loss and/or damage until goods have been placed in or on cars or lighters at forwarding point, and clean bill of lading has been furnished by the railroad company

B. Buyer must
- (1) be responsible for loss and/or damage incurred thereafter
- (2) pay all transportation charges (buyer is then entitled to deduct from the amount of the invoice the freight paid from primary point to named port)
- (3) handle all subsequent movement of the goods
- (4) unload goods from cars
- (5) transport goods to vessel
- (6) pay all demurrage and/or storage charges
- (7) arrange for storage in warehouse or on wharf where necessary

4. The seller may desire to quote a price covering the transportation of the goods to seaboard, assuming responsibility for loss and/or damage up to that point. In this case, the proper term is:

"F. O. B. Cars (named point on seaboard)"

Under this quotation:

A. Seller must
- (1) place goods on or in cars
- (2) secure railroad bill of lading
- (3) pay all freight charges from forwarding point to port on seaboard
- (4) be responsible for loss and/or damage until goods have arrived in or on cars at the named port

B. Buyer must
- (1) be responsible for loss and/or damage incurred thereafter
- (2) unload goods from cars
- (3) handle all subsequent movement of the goods
- (4) transport goods to vessel
- (5) pay all demurrage and/or storage charges

(6) arrange for storage in warehouse or on wharf where necessary

5. It may be that the goods, on which a price is quoted covering the transportation of the goods to the seaboard, constitute less than a carload lot. In this case, the proper term is:

"F. O. B. Cars (named port) L. C. L."

Under this quotation:

A. Seller must
   (1) deliver goods to the initial carrier
   (2) secure railroad bill of lading
   (3) pay all freight charges from forwarding point to port on seaboard
   (4) be responsible for loss and/or damage until goods have arrived on cars at the named port

B. Buyer must
   (1) be responsible for loss and/or damage incurred thereafter
   (2) handle all subsequent movement of the goods
   (3) accept goods from the carrier
   (4) transport goods to vessel
   (5) pay all storage charges
   (6) arrange for storage in warehouse or on wharf where necessary

6. Seller may quote a price which will include the expense of transportation of the goods by rail to the seaboard, including lighterage. In this case, the proper term is:

"F. O. B. Cars (named port) *Lighterage Free*"

Under this quotation:

A. Seller must
   (1) place goods on or in cars
   (2) secure railroad bill of lading
   (3) pay all transportation charges to, including lighterage at, the port named.
   (4) be responsible for loss and/or damage until goods have arrived on cars at the named port

B. Buyer must
   (1) be responsible for loss and/or damage incurred thereafter
   (2) handle all subsequent movement of the goods
   (3) take out the insurance necessary to the safety of the goods after arrival on the cars
   (4) pay the cost of hoisting goods into vessel where weight of goods is too great for ship's tackle

(5) pay all demurrage and other charges, except lighterage charges

7. The seller may desire to quote a price covering delivery of the goods alongside overseas vessel and within reach of its loading tackle. In this case, the proper term is:

"F. A. S. vessel (named port)"

Under this quotation:

A. Seller must

(1) transport goods to seaboard

(2) store goods in warehouse or on wharf if necessary, unless buyer's obligation includes provision of shipping facilities

(3) place goods alongside vessel either in a lighter or on the wharf

(4) provide the usual dock or ship's receipt

(5) be responsible for loss and/or damage until goods have been delivered alongside the ship or on wharf

B. Buyer must

(1) be responsible for loss and/or damage thereafter, and for insurance

(2) handle all subsequent movement of the goods

(3) pay cost of hoisting goods into vessel where weight of goods is too great for ship's tackle

8. The seller may desire to quote a price covering all expenses up to and including delivery of the goods upon the overseas vessel at a named port. In this case, the proper term is:

"F. O. B. vessel (named port)"

Under this quotation:

A. Seller must

(1) meet all charges incurred in placing goods actually on board the vessel

(2) provide the usual dock or ship's receipt

(3) be responsible for all loss and/or damage until goods have been placed on board the vessel

B. Buyer must

(1) be responsible for loss and/or damage thereafter

(2) handle all subsequent movement of the goods

9. The seller may be ready to go farther than the delivery of his goods upon the overseas vessel and be willing to pay transportation to a foreign point of delivery. In this case, the proper term is:

"C. & F. (named foreign port)"

Under this quotation

A. Seller must

(1) make freight contract and pay transportation charges sufficient to carry goods to agreed destination
(2) deliver to buyer or his agent clean bills of lading to the agreed destination
(3) be responsible for loss and/or damage until goods have been delivered alongside the ship and clean ocean bill of lading obtained (seller is not responsible for delivery of goods at destination)

B. Buyer must

(1) be responsible for loss and/or damage thereafter and must take out all necessary insurance
(2) handle all subsequent movement of the goods
(3) take delivery and pay costs of discharge, lighterage and landing at foreign port of destination in accordance with bill of lading clauses
(4) pay foreign customs duties and wharfage charges, if any

10. The seller may desire to quote a price covering the cost of the goods, the marine insurance on the goods, and all transportation charges to the foreign point of delivery. In this case, the proper term is:

"C. I. F. (named foreign port)"

Under this quotation

A. Seller must

(1) make freight contract and pay freight charges sufficient to carry goods to agreed destination
(2) take out and pay for necessary marine insurance
(3) deliver to buyer or his agent clean bills of lading to the agreed destination, and insurance policy and/or negotiable insurance certificate
(4) be responsible for loss and/or damage until goods have been delivered alongside the ship, and clean ocean bill of lading and insurance policy and/or negotiable insurance certificate have been delivered to the buyer, or his agent. (Seller is not responsible for the delivery of goods at destination, nor for payment by the underwriters of insurance claims)
(5) provide war risk insurance, where necessary, for buyer's account

B. Buyer must

(1) be responsible for loss and/or damage thereafter, and must make all claims to which he may be entitled under the insurance directly on the underwriters

(2) take delivery and pay costs of discharge, lighterage and landing at foreign port of destination in accordance with bill of lading clauses

(3) pay foreign customs duties and wharfage charges, if any

Explanations of Abbreviations

F. O. B. .... Free on board
F. A. S. .... Free along side
C. & F. .... Cost and freight
C. I. F. .... Cost, insurance and freight
L. C. L. .... Less than carload lot

GENERAL RECOMMENDATIONS

In reaching the conclusions set forth in this statement the Conference considered the fact that there are, in more or less common use by manufacturers in different parts of the United States, numerous variations of these abbreviations, practically all of which are employed to convey meanings substantially synonymous with those here defined. For instance, there are manufacturers who quote "F. O. B. Cars," "F. O. B. Works," "F. O. B. Mill" or "F. O. B. Factory" meaning that the seller and buyer have the same responsibilities as those set forth in Section 1. The Conference considered all those variations and determined to recommend the use of "F. O. B. (named point)," as "F. O. B. Detroit," "F. O. B. Pittsburgh," etc. Of the considerable number of these abbreviations which are used in the United States, the Conference felt that the form "F. O. B. (named point)" is most widely used and understood, and therefore should be adopted as the standard of practice.

The chief purpose of the Conference is to simplify and standardize American practice, and to that end it urges manufacturers and exporters to cease the use of synonymous abbreviations and quote habitually in the terms here recommended, just as far as these terms will cover the price conditions which it is desired to arrange with the buyer.

Variations of the abbreviations recommended in other sections also are in more or less common use throughout the United States. The recommendations of the Conference set forth above apply to them with the same force as to those cited under Section 1.

Manufacturers and exporters are urged to bear in mind that the confusion and controversies which have arisen have sprung in part

from the use of an excessive number of abbreviated forms with substantially similar meanings, as well as from the use of abbreviations in a sense different from their original meanings, or in an application not originally given them and different from the sense or application understood by foreign buyers.

In simplified and standardized practice lies the best hope of reducing confusion and avoiding controversy.

The Conference urges upon manufacturers and exporters the very great importance at all times of making their intention in whatever quotations they employ so thoroughly clear as to be impossible of misunderstanding or misinterpretation. It is much better to take the time and space at the outset to make the quotation clearly understood, than to be compelled in the end to go through vexatious controversy or litigation, which costs not only time and expense but customers as well. Misunderstandings can best be avoided if the seller will formulate a written statement of the general conditions under which his sales are to be made, and will see that the foreign buyer possesses these terms of sale when considering a quotation. The items which may be included in such a statement, deal with: delivery, delays, partial shipments, shipping instructions, inspection, claims, damage, and payment. If all contingencies are thus covered by carefully considered conditions of sale, disputes will largely be prevented.

The quotation "F. O. B. (named port)" as "F. O. B. New York," "F. O. B. New Orleans," "F. O. B. San Francisco," is often used by inland producers and distributors to mean merely delivery of the goods at railway terminal at the port named. This abbreviation originated as an export quotation and had no application to inland shipments. It was used only to mean delivery of the goods upon an overseas vessel at the port named. That, in fact, is the meaning universally given to the phrase among foreigners, and is the meaning which the best practice among exporters requires it invariably to have. But because of the confusion which has arisen through the use of that form with a different meaning by inland producers and distributors, and in the interest of unmistakable clarity, the Conference most strongly urges the invariable use by American manufacturers and exporters of the form "F. O B. Vessel (named port)." This adds only one word to the abbreviated form and has the great advantage that it cannot be misunderstood. It also avoids the difficulty which might arise among foreigners not always well versed in American geography, through confusing an inland forwarding point with a shipping port at seaboard.

The Conference calls attention to the fact that in selling "F. A. S.

Vessel" manufacturers and exporters should be careful to have their agreements with buyers cover explicitly the question of responsibility for loss after goods have been delivered on the wharf or alongside the vessel and before they are actually loaded on the ship, There is no generally established practice on this point. The recommendation of the Conference in the definitions of responsibility under section 7, sets up a rule which it is hoped will lead to the establishment of a standard practice.

It is understood that the provision of lighterage covered in several of these recommendations is only within the usual free lighterage limits of the port, and that where lighterage outside such limits is required, it is for buyer's account.

In order to avoid confusion in another particular, attention is called to the care which must be exercised in all cases in making weight quotations. The net ton, the gross ton and the metric ton, all differ in weight. Similarly there is a variation in the use of the term "hundred-weight" to mean either 100 pounds or 112 pounds. It is, therefore, not sufficient to quote a price per "ton" or per "hundred weight." Instead the Conference recommends the use of the terms "ton of 2,000 lbs," "ton of 2,240 lbs.", or "ton of 2,204 lbs.", etc., whichever is intended.

It is also important to note that a carload lot in the United States means the quantity of the particular commodity in question necessary to obtain the carload freight rate for transportation on American railways. This quantity varies according to the commodity and also varies in different parts of the country. Certain commodities being more bulky than others, the minimum carload for them is less than for heavier products occupying less space. The load required may range anywhere from 12,000 to 90,000 pounds. Consequently it is important, when quoting prices applicable to carload lots, to so state and to specify the minimum weight necessary to make a carload lot of the particular commodity for the particular shipment in question.

The Conference points out that in quoting "C. & F." or "C. I. F.", manufacturers and exporters moving large quantities of material by one vessel should be careful to ascertain in advance the buyer's capacity to take delivery. This because, under these terms and as a condition of making the freight rate, transportation companies may require a certain rate of discharge per day, and that rate of discharge might be in excess of the buyer's capacity to take delivery. In such event an adjustment with the transportation company would be necessary, which might affect the freight rate and consequently the price to be quoted.

The Conference also strongly urges shippers clearly to understand the provisions of their insurance protection on all foreign sales, irrespective of the general terms used thereon. In almost all cases it should be possible, when making shipments by steamer, to obtain insurance cover giving full protection from primary shipping point to designated sea port delivery, and/or foreign port delivery. As ordinary marine insurance under F. P. A. conditions, *i. e.* free of particular average, gives no protection against deterioration and/or damage to the merchandise itself while in transit, when caused by the recognized hazards attending such risks, shippers should endeavor in all cases to obtain insurance under W. P. A. (S. P. A.) conditions, *i. e.* with particular average (subject to particular average), when in excess of the customary franchise of 3 per cent to 5 per cent. Under such form of insurance, underwriters will be called upon to pay claims for damages when these exceed the stipulated franchise.

The Conference points out that inasmuch as fees for consular invoices and similar items are arbitrary charges fixed by foreign governments, they are not included in the terms of C. & F. or C. I. F. quotations, and it is part of the duty of the buyer to meet them.

Finally, the Conference strongly recommends, as a most effective measure of simplification, the general practice of quoting for export, as far as possible, either "F. A. S. Vessel," "F. O. B. Vessel" or "C. I. F." Concentration on this small list, all of which terms are readily understood abroad and are difficult of misinterpretation, will, it is felt, be markedly influential in avoiding confusion and controversy.

The conclusions and definitions set forth above are the recommendations of a Conference which was composed of representatives of nine of the great commercial organizations of the United States interested in foreign trade. Not all have as yet the force of law or long established practice; but it is the hope and expectation of the Conference that these recommendations will receive such adherence on the part of American producers and distributors, as to make them in fact the standard American practice. And it is therefore, expected that in due time they will receive the sanction of legal authority.

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